IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9957 of 2023

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Akhilesh Prasad aged about 61 years, Gender-Male, son of Late Dayanand Prasad, Resident of West Ramkrishna Nagar, Jyotish Path (near Kamlesh Apartment), P.S.-Ramkrishna Nagar, District-Patna.

... ... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary, Rural Work Department, Bihar, Patna.
3. The Special Secretary, Rural Work Department, Bihar, Patna.
4. The Deputy Secretary, Rural Work Department, Bihar, Patna.
5. The Engineer in Chief, Rural Work Department, Bihar, Patna.
6. The Superintendent Engineer Rural Work Department, Work Division Motihari, (East Champaran).
7. The Executive Engineer Rural Work Department, Work Division Motihari, (East Champaran).
8. The Superintendent Engineer Rural Work Department, Work Division Patna.
9. The Executive Engineer Rural Work Department, Work Division Patna.
10. The Executive Engineer Rural Work Department, Work Division Barh, Patna.
11. The Treasury Officer, Patna.
12. The Accountant General , Bihar, Veer Chand Patel Path, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Devendra Kumar Sinha, Sr. Advocate
		Mr. Pramod Kumar Sinha, Advocate
For the State	:	Mr. Prabhat Ranjan, AC to GP-6
For the A.G.	:	Ms. Nivedita Nirvikar, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH
ORAL JUDGMENT

Date : 05-09-2023

Heard Mr. Devendra Kumar Sinha, learned senior counsel assisted by Mr. Pramod Kumar Sinha, learned counsel appearing on behalf of the petitioner; Mr. Prabhat Ranjan, learned AC to learned GP-6 appearing on behalf of the State and Ms. Nivedita Nirvikar, learned senior counsel for the Accountant General, Bihar.

2. Learned counsel appearing on behalf of the petitioner submits that petitioner, who had retired on 31.10.2022 from the post of Assistant Engineer, Rural Works Department, Barh Division, District- Patna, has unfairly been disentitled to his rightful claim of 10% pension, 10% gratuity and full leave encashment by virtue of Memo No. 212 dated 12.01.2023, wherein, in the garb of a superficial charge that the petitioner has been found to have not completed the entire work which was allotted to him within the specified period, the above mentioned claims of the petitioner has been held up. No departmental proceeding has been initiated or is pending against him for the charge as stated in Memo No. 212 dated 12.01.2023. Learned counsel further submits that the action of the respondent in withholding 10% pension, 10% gratuity and full leave encashment is without authority of law, because pursuant to the show cause issued to the petitioner and after submission of his explanation on 29.08.2020 and 03.11.2021, no further communication/order/notice of any kind with regard to said allegation was served upon the petitioner.

3. In spite of the said fact, the concerned authority has not taken any action to release the entire amount of pension, gratuity and leave encashment due to the petitioner. The petitioner has been forced to file the present writ petition for the

claim of payment for which he has already submitted representation to Respondent No.3-the Special Secretary, Rural Works Department, Government of Bihar, Patna on 13.02.2023.

4. Learned counsel appearing on behalf of the State admits that instruction to that effect is that after the submission of explanation on 29.08.2020 and 03.11.2021, till date no show cause/ order has been passed to the petitioner for withholding of pension, gratuity and leave encashment.

5. Heard the rival submissions made by the parties and perused the records of the writ petition.

6. The admitted fact is that after submission of explanation on 29.08.2020 and 03.11.2021 by the petitioner in response to Letter No.164 dated 24.02.2020 (Annexure 1) and Letter No.1193 dated 23.06.2020 (Annexure 3) respectively , till date no further order/ show cause has been served upon the petitioner and any departmental proceeding has also not been initiated against the petitioner, but no action has been taken by Respondent No. 3- the Special Secretary, Rural Works Department, Government of Bihar, Patna for making payment of remaining 10% of pension, 10% gratuity along with full leave encashment. The petitioner has already filed a detailed representation before him but for reasons best known to him, he has not sanctioned full pension, gratuity and leave encahsment till

date even without contemplation of initiating departmental proceeding.

7. The Memo No. 212 dated 12.01.2023, discloses the amounts , such as 10% pension, 10% gratuity and full leave encashment have been withheld. The power to withhold pension, which also includes gratuity, by the State Government is subject to the provisions of Rule 43(a) and 43(b) of Bihar Pension Rules. Even though leave encashment has not been mentioned under Rule 43(a) and 43(b), the State Government already issued a circular through Finance Department on 22.08.1974 under Rule 5 of the Bihar Service Code, prohibiting the payment towards gratuity as well as leave encashment.

8. In the case of ***Bajrang Deo Narain Sinha v. The State of Bihar (L.P.A. No. 124 of 1999***, ***disposed of on 26.08.1999) (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. Rule 43(b) puts some conditions, i.e. Departmental proceeding as indicated in Rule 43(b) if not

instituted while the Government servant was on duty then it shall not be instituted except:-

(a) with the sanction of the Government;

(b) it shall be in respect of an event which took place not more than four years before the institution of the proceedings;

(c) such proceedings shall be conducted by the enquiry officer in accordance with the proceedings by which dismissal of the services can be made.

Before the power under Rule 43(b) can be exercised in connection with alleged misconduct of the retired Government servant, it must be shown that in departmental proceeding or judicial proceeding, the concerned Government servant has been found guilty of grave misconduct. Unless the pensioner is found guilty of misconduct in a departmental or a judicial proceeding, any part of his pension cannot be withheld. The employee's right to pension is a statutory right. The measure of deprivation of his pension must be commensurate with the gravity of misconduct as it offends the right to assistance as framed under Article 41 of the Constitution. The pensionary dues payable to the employees including Gratuity which is also pension within the meaning of Bihar Pension Rules cannot be withheld. Similarly, Leave Encashment cannot also be withheld since that is paid in lieu of unutilized leave.

10. In this matter, admittedly, the impugned Memo No. 212 dated 12.01.2023, has been passed withholding pension, gratuity and leave encashment sans any departmental proceeding having been initiated against the petitioner, let alone the issue of mandatory compliance to the requisite of Rule 43(a) and 43(b) of Bihar Pension Rules. Clearly, the impugned Memo No. 212 dated 12.01.2023, is arbitrary and in violation of the established rules.

11.The Hon'ble Jharkhand High Court in the case of ***Dr. Dudh Nath Pandey v. The State of Jharkhand & Ors.*** reported in ***2007 SCC OnLine Jhar 831***, has held as follows:-

> ***"20.*** *Therefore, we are to hold while answering the first question that the Government has no power to withhold pension or Gratuity on the ground of pendency of judicial or departmental proceedings and there is no power at all for the State Government to withhold the leave encashment under Rule 43(b) at any stage.*
> ***23.*** *It is noticed that there is no statute, rule or any law, which empowers the State Government to withhold the leave encashment As mentioned earlier, Rule'43(a) and 43(b) would not provide for the withholding, of leave encashment. Under those circumstances, the respondents took the stand that the withholding of the leave encashment was under the circular issued by the Finance Department.*
> ***25.*** *In the light of the ratio laid down by the Supreme Court, let us now see the circular, which has been issued by the Finance Department:—*
>
> *"(Vernacular matter omitted)*
>
> *English Translation of Circular of Finance Department*

Subject : Payment of Leave Encashment equivalent to unutilized Earned Leave on the date of Superannuation.

The undersigned is directed to state on the subject referred to above that the vari-ous departments desired to know as to whether the payment of leave encashment in lieu of unutilized earned leave can be stopped in cases of those employees against whom departmental proceeding, criminal case or judicial enquiry have not been concluded till the date of retirement or who have retired during suspension?. In this context F.D. Memo 2150/F dated 19-7-84 clearly stipulates in para-2 that all payments of leave encashment equivalent to unutilized earned leave treated under the category of admissible pay. Therefore, the Govt. dues can be recovered in one lump sum from the concerned employees out of the said payments. From these provisions it is clearly implied that if the payments of leave encashment equivalent to unutilized earned leave is paid to those retired employees against whom, any proceeding is pending and there may be a practically difficult to recover the dues. With this view it has been provided that recovery can be made in all such cases where the proceeding has not been concluded. In spite of these it is felt that the State Government's Rules in this regard are not so explicit in compare to Rule 29(3) of CCS (Leave) Rules.

2. In the above context the undersigned had been directed to clarify that the competent authority empowered to sanction leave on his discretion, can withhold the payment of entire amount of leave encashment or part thereof, where the departmental proceeding, criminal case or judicial enquiry has not been concluded against those retired Government servants on their date of retirement and where as a result of conclusion of proceedings a possibility of recovery exists. The entire withheld amount would be released on conclusion of the proceedings. But where it is decided to recover any amount on conclusion of the proceedings then in such cases the balance amount would be *released after adjusting the dues.*

It is requested that this clarification should be made known to all concerned. (Memo 3/F-2-01/93/4564/F dated 6-7-93).

26. *The perusal of the above circular, which has been issued on 6-7-1993, it transpires that it is in the nature of executive instructions issued by the Finance department. The said executive instruction contemplates the situation where there is some due against the retired Government servant. The State contemplates certain situation and condition under which certain dues could be recovered from the leave encashment. Therefore, the executive instructions contemplate that the entire leave encashment should not be given to such Government servant from whom some Government dues is recoverable. Therefore, the entire Leave Encashment should only be paid after completion of the inquiry. After the completion of the Inquiry the amount of due which can be quantified can be adjusted from the Leave Encashment and remaining amount can be paid.*

27. *The above executive instruction is not a law under Art. 300A of the Constitution of India. In the absence of any statutory rule, how can it be claimed that the Leave Encashment can be withheld by the Government on the strength of the executive instructions?*

28. *The impugned order which has been passed against the pensioner-appellant under Rule 43(b) does not speak about any amount recoverable from the petitioner and the amount has been withheld merely because of pendency of the criminal case. Admittedly, the circular, relied upon now by the respondents, has not been quoted in the impugned order. Only Rule 43(b) is quoted. As such the executive instruction dated 6-7-1993 through a Circular issued by the Department cannot apply to the facts of this case.*

29. *According to the respondents, the circular has the force of law as it has been* *issued under Rule 5 of the Bihar Service Code. Rule 5 of the Bihar Service Code provides thus: —*

5. No power under these rules may be exercised by the State Government except after consultation with Finance Department. It shall be open to that department to prescribe by general or special order, cases in which its consent may be presumed to have been given, and to require that its opinion on any matter on which it has been consulted shall be submitted to the Council of Ministers by the consulting department.

***30.** Perusal of the above Rule would make it clear that in exercising the powers under the provisions of Bihar Service Code, an executive instruction can be issued with the consent of the Finance Department. Thus, it is clear that before issuance of any circular with the consent of the Finance Department, the Government has to see whether it has power under statutory rule to issue such a circular. On the other hand, it is clear that no rule provides any power to the State Government to withhold Leave Encashment so as to attract Rule 5.*

***31.** In other words, if there is a power available under any other rule or law to withhold leave encashment, the same can be further governed by executive instructions under Rule 5. Thus, Rule 5 of the Bihar Service Code does not help the respondents nor does it empower the State to withhold the Leave Encashment. As the circular was not issued under any powers conferred under the Rules, the Executive Instruction, which is a guideline cannot have the force of law.*

***32.** It is held in (2003) 1 SCC 591 : (AIR 2003 SC 250) the expression law within the meaning of Article 300A would mean a Parliamentary Act or an Act of the State Legislature or a statutory order having the force of law. The State Government cannot while taking recourse to the executive power of the State under Article 162, deprive a person of his property. Such power can be exercised only by* *authority of law and not by a mere executive fiat or order."*

33. *In the light of the above ruling, we are to hold that the circular issued by the Fi nance Department has no force of law and as such would not confer any power to with hold the leave encashment, which is termed as property.*

34. *To sum up the answer for the two questions are as follows:—*

(i) Under Rule 43(a) and 43(b) of Bihar Pension Rules, there is no power for the Government to withhold Gratuity and Pension during the pendency of the departmental pro ceeding or criminal proceeding. It does not give, any power to" withhold Leave Encashment at any stage either prior to the proceeding or after conclusion of the proceeding,

(ii) The Circular, issued by the Finance Department, referring to the withholding of the leave encashment would not apply to the present facts of the case as it has no sanctity of law.

35. *Both the questions are answered accordingly. Consequently, the order impugned and the order of learned single Judge are quashed."*

12. In light of the above observations, Respondent No. 3- the Special Secretary, Rural Works Department, Government of Bihar, Patna, is directed to forthwith issue sanction letter to the Accountant General, Bihar for releasing remaining 10% pension, 10% gratuity and full leave encashment and communicate the same to the Treasury Officer, Secretariat Treasury, Sinchai Bhawan, Bailey Road, Patna to forthwith credit

the entire amount of pension, gratuity and leave encashment payable to the petitioner into the pensionary account of the petitioner within one or two days after receiving the authority letter from the Accountant General, Bihar.

13. In case of failure by any of the authorities concerned, the petitioner is at liberty to take appropriate legal action against them. In case petitioner is aggrieved by non-payment of interest then he may file representation before Respondent No. 3- the Special Secretary, Rural Works Department, Government of Bihar, Patna, who will dispose of the representation filed by the petitioner within a period of six weeks.

14. With above observations and directions, the present writ petitioner stands disposed of.

(Purnendu Singh, J)

Niraj/Nilmani

AFR/NAFR	NAFR
CAV DATE	N/A
Uploading Date	08.09.2023
Transmission Date	N/A