

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13557 of 2021

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Akhileshwar Kumar Mishra S/o Late Nandkishore Mishra resident of Village-
Mohammadpur, P.S.- Sakra, Dist.- Muzaffarpur.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Planning and Development, Government of Bihar.
2. The Principal Secretary Department of Science and Technology, Government of Bihar, Patna.
3. The Joint Secretary Department of Science and Technology, Government of Bihar, Patna.
4. Vigilance Investigation Bureau, through ADG, 6 Circular Road, Patna.
5. The District Magistrate, East Champaran at Motihari.
6. The Regional Planning Officer, Tirhut Division, Muzaffarpur.
7. The District Planning Officer, East Champaran at Motihari.
8. The District Education Officer, East Champaran at Motihari.
9. The Principal cum Chief Co-Coordinator, Border Area Development Programme, Motihari College of Engineering, Motihari.
10. The Chief Accountant General, Bihar, Birchand Patel Path, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Anand Ojha with Mr. Sangeet Deokuliar, Advocates
For the State	:	Mr. Vikash Kumar, SC 11
For the Vigilance	:	Mr. Anil Singh, Advocate
For the Accountant General	:	Mrs. Ritika Rani, Advocate

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT

Date : 06-08-2024

This Court has heard Mr. Anand Ojha, learned
Advocate for the petitioner, Mr. Vikash Kumar, learned



Standing Counsel-11, Mr. Anil Singh, learned Advocate for the Vigilance and Mrs. Ritika Rani, learned Advocate for the Accountant General.

2. The petitioner superannuated on 31.07.2019 from the post of Assistant Professor while he was working on deputation in MCE Motihari from MIT, Muzaffarpur. Being aggrieved by the inaction of the respondent State officials in not granting the retiral and other consequential benefits, the petitioner invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution seeking direction upon the respondents to ensure payment of all his retiral and other consequential benefits such as gratuity, leave encashment and pension without deduction of 10% and total amount of retiral benefits as per 7th Revised Pay Scale with statutory interest.

3. The brief facts, of the case are that while the petitioner was on deputation at MCE Motihari, he was Principal In charge of the college from 07.12.2011 to 15.01.2017. The Motihari College of Engineering is a State Government owned institution under the administrative control of the Department of Science and Technology, Government of Bihar. When the petitioner was the Principal In charge of the College, he was authorised to conduct some skill development programme in 6



Bordering Blocks of the district under Border Area Development Programme funded by the Central Government. The petitioner was nominated as Principal-cum-Chief Coordinator for conduct of skill development programme. On account of alleged charges of financial irregularities, Vigilance (Patna) P.S. Case No. 27 of 2018 corresponding to Special Case (Vigilance) No. 16/18 was instituted against the petitioner and other accused persons.

4. During the pendency of the aforementioned criminal case the petitioner came to be superannuated on 31.07.2019 and thus the respondent authorities have been pleased to sanction 90% of provisional pension to the petitioner vide order bearing No. 194 dated 20.01.2020. The respondent authorities made it clear that the gratuity, leave encashment and 10% of pension could not be sanctioned by the competent authorities in view of the provisions of rule 43(c) and 43(d) of the Bihar Pension Rules, 1950 (hereinafter referred to as the 'Rules, 1950') on account of pendency of the criminal case.

5. Mr. Anand Ojha, learned Advocate for the petitioner, by pressing the present writ petition has primarily submitted that the rules regarding grant of pension governs under the statutory rules and undoubtedly in the absence of any



statutory provisions for retaining the pension, the order passed by the authorities are illegal. Drawing the attention of this Court, especially to rule 43(b) of the Bihar Pension Rules, 1950, he contended that the State Government has the power to withhold or withdraw pension or any part of it when the pensioner is found guilty of grave misconduct either in a departmental proceeding or judicial proceeding. Thus the provision does not empower the State to invoke the said power while the departmental proceeding or judicial proceeding is pending. The power under rule 43(b) can be invoked only when proceedings are concluded finding guilty and not before. Referring to rule 43(c) which came into force on 19.07.2012, the learned Advocate further contended that it clearly speaks that where the departmental proceeding or judicial proceeding in which the prosecution has been sanctioned against such government 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 maximum admissible amount of pension but shall in no case be less than 90%.

6. The issue as to whether the leave encashment of a



government employee besides gratuity can be withheld under the provisions of the Bihar Pension Rules in view of statutory provision as contained in rule 43(c) of the Bihar Pension Rules, 1950 came to be considered by the Full Bench of this Court in the case of *Arvind Kumar vs. State of Bihar, 2018(2) PLJR 933*. The learned Full Bench of this Court in unambiguous terms held that an employee who is facing departmental enquiry or judicial proceeding on the date of his superannuation would be entitled to provisional pension which would include gratuity to the tune of amount not less than 90%. So far as the issue of leave encashment is concerned which did not provide under the Pension Rules, the learned Full Bench has observed that when terms and conditions with regard to encashment of leave is not governed by any statutory provision and when the same is granted by an executive or administrative decision of the State Government so long as the administrative decision to withhold encashment of earned leave subsists, then on the happening of such circumstances as are contemplated, we see no reason to hold that the leave encashment can be granted even in cases where the employee at the time of retirement is facing departmental or judicial proceeding. It has further been clarified that the government is well within its power in withholding



leave encashment if the circumstances require to do so.

7. Explaining the aforementioned provisions, Mr. Ojha, learned Advocate has further highlighted the provision of rule 43(d) of the Bihar Pension Rules, 1950 on the strength of which the respondent authorities have withheld full gratuity of the petitioner. In sum and substance, rule 43(d) empowers the State authorities that full amount of gratuity may be withheld, till the final conclusion of the departmental or judicial proceeding; if a government servant is facing departmental or judicial proceeding on the date on which he superannuates, provided that where departmental proceedings has been initiated under rule 19 of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005. To be noted that rule 43(d) of Rules, 1950 brought in force vide Memo No. 77 dated 21.01.2019.

8. The question as to whether the rigors of rule 43(d) apply retrospectively so as to deprive a pensioner from getting his admissible gratuity amount, was under consideration before the learned co-ordinate Bench of this Court in the case of ***Dr. Aquil Ahmad vs. The State of Bihar*** since reported in ***2021(1) PLJR 293***. The learned coordinate Bench in its penultimate paragraph no. 33 has held as follows:



“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 v. Union of India reported in (1978) 2 SCC 50 : 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).”

9. In order to buttress his another fold of submission, he has taken this Court to the explanation of rule 43 of Rules, 1950 and vigorously contended that a judicial proceeding shall be deemed to have been instituted in a case of criminal proceeding, on the date on which a complaint is made or



chargesheet is submitted to a criminal court.

10. Admittedly in the case in hand the investigation in relation to Vigilance (Patna) P.S. Case No. 27 of 2018, corresponding to Special (Vigilance) No. 16/2018 is still on-going. It is worth mentioning that till date no chargesheet has been submitted in the present case, much less against the petitioner. Once the chargesheet is not submitted, in no stretch of imagination, judicial proceeding shall be deemed to have been initiated; thus invocation of rule 43(d) withholding full gratuity and leave encashment is not at all sustainable in the eyes of law, is the contention of the learned Advocate for the petitioner. Learned Advocate for the petitioner further urged that when the words used in the statute are clear; plain reading is to be accorded. The Legislatures also use words carefully to cover the entire gamut of circumstances and to avoid any instance of ambiguity. The courts always lean against any interpretation which renders the scheme of statute unworkable. The principles of statutory construction had been explained in various judgment rendered by the Hon'ble Supreme Court. To buttress his submission, reliance is placed on ***Jaishri Laxmanrao Patil v. State of Maharashtra, (2021) 8 SCC 1*** wherein the Hon'ble Supreme Court reiterating the principle of interpretation in



various judgments has concluded that there cannot be disagreement with the proposition that where the provisions of the statute or its wordings are ambiguous, the first attempt should be to find meaning, through internal aids, in the statute itself. Failing this, it is open to the court to find meaning, and resolve the ambiguity, by turning to external aids, which include Statements of Objects and Reasons, as well as parliamentary reports, or debates in Parliament. It is a trite law that the court would ordinarily take recourse to the golden rule of literal interpretation.

11. Learned Advocate for the petitioner lastly contended that the pension and gratuity not being a bounty, the pensioner has right to receive pension by virtue of the rules. It is neither a gratuitous gift nor a matter of discretion of the officers of the Department. The right to pension is a *quid pro quo* for having rendered services to the employer. The payment of pension or any decision impacting such right or curtailing/withholding any right to pension shall only be as per the provisions of the rules. Reliance has also been placed on a judgment rendered by the Hon'ble Supreme Court in the case of ***D.S. Nakara v. Union of India, (1983) 1 SCC 305*** and ***State of Jharkhand v. Jitendra Kumar Srivastava, (2013) 12 SCC 210***.



12. *Per contra*, learned Government Advocate referring to the averments made in the counter affidavit as well as the supplementary counter affidavit submits that in exercise of powers conferred under Article 309 of the Constitution of India the amendment has taken place in the Bihar Pension Rules, 1950. Rule 43(d) attracts, if any departmental or judicial proceeding is pending against the government servant at the time of his retirement, which empowers the State Government to withhold full amount of gratuity till the final conclusion of departmental or judicial proceeding. The gratuity, leave encashment and 10% of pension were not sanctioned by the competent authority because a criminal case is pending against the petitioner, which was lodged against him much before his superannuation. It is further contended that the Government is well within its power to withhold leave encashment when an employee is facing criminal case or judicial proceeding under the executive instructions issued by the State Government which still holds the field good. The petitioner has been found indulge in financial irregularities and there is every chance of recovery of defalcation of amount, if the petitioner is found guilty in judicial proceeding.

13. Learned Advocate for the Vigilance on instructions



also apprised this Court that till date chargesheet has not been submitted in the present case. It is fairly submitted by the learned Advocates for the Vigilance as well as the Accountant General that the issue requires interpretation of provision and its applicability.

14. This Court has carefully heard the learned Advocates for the respective parties and also perused the materials available on record. The question for consideration before this Court is in narrow compass as to whether a departmental proceeding shall be deemed to have been instituted in the case of criminal proceeding on the date on which the FIR is lodged or charge sheet is submitted or mere lodging of the FIR would be suffice to invoke the provision of rule 43(d) of Rules, 1950, which empowers the State Government to withhold gratuity, if a government employee is facing departmental/judicial proceeding on the date he superannuates.

15. Admittedly rule 43(d) of Rules, 1950 came into force on 21.01.2019 vide amendment under Memo Order No. 77 dated 21.01.2019. The issue with regard to retrospective application of rule 43(d) of Rules, 1950 has been answered by the learned coordinate Bench of this Court in the case of ***Dr. Aquil Ahmad*** (supra). It would be relevant to quote paragraph



nos. 20, 21, 27 and 28.

“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.”

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”.*

16. In view of the settled proposition, this Court has no



hesitation to hold that the amendment in rule 27 of Rules, 1950 by way of substituting and inserting sub rule (d) of rule 43 in the Bihar Pension Rules, 1950 have no retrospective application. This Court had also occasion to deal with the similar issue in the case of *Param Hans Kumar Singh vs. The State of Bihar, 2023(1) PLJR 635*. This Court reiterating the aforementioned proposition rendered in the case of *Arivind Kumar Singh* (supra) and *Dr. Akil Ahmad* (supra) has held the impugned order to be not sustainable in law whereby the full gratuity, leave encashment and other retiral benefits were withheld by the State respondent authorities in terms of rule 43(d) of the Bihar Pension Rules irrespective of the fact the petitioner of the said case retired from his post on 31.12.2012.

17. Now coming to the another issue as to whether in the case in hand where the investigation is still going on and the chargeheet has not been submitted, in such circumstances whether the judicial proceeding shall be deemed to have been instituted, when the criminal case has been instituted much prior to the superannuation of a person.

18. Before parting with the final outcome it would be apt to quote explanation (a) and (b) of rule 43 of Rules, 1950 which reads as follows:



“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.”*

19. Bare reading of the aforesaid explanation, two expressions complaint and charge sheet have been used in order to cover all the contingencies of judicial proceeding. Section 2(d) of Cr.P.C. defines the complaint whereas Section 173 refers to the final report submitted by the police after investigation. The final report connotes conclusion of the investigation either when the investigation culminated into finding of *prima facie*, case against the accused persons or to not sent up the accused persons for trial in case no *prima facie* material is found against the accused persons. The legislature while answering the explanation has obviously given emphasis on a, *prima facie*,



case after conclusion of the investigation. The FIR only denotes first information with regard to some cognizable offence which set the law into motion to investigate and proceed in accordance with law and ensure submission of final report after collecting material during course of investigation which culminates in cognizance being taken by the Magistrate.

20. It is trite that duty of judicature is to act upon the true intention of the legislature. The courts have, therefore, to look essentially to the words of the statute to discern the 'referant' aiding their effort as much possible by the context. The first and primary rule of construction, as has been observed by Gajendragadkar, J. in the case of ***Kanai Lal Sur vs. Paramnidhi Sadhukhan, AIR 1957 SC 907***; is that the intention of the Legislature must be found in the words used by the Legislature itself. The question is not what may be supposed to have been intended but what has been said. When the words of statute are clear, plain and unambiguous, i.e., they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of consequences.

21. Bare reading of explanation (b) of rule 43 of Rules, 1950 gives only one interpretation that judicial proceeding in



case of criminal proceeding shall be deemed to have been instituted on the date on which a complaint is made or charge sheet is submitted to a criminal court. Admittedly, in the case in hand charge sheet has not been submitted. Thus, this Court has no hesitation to hold that withholding of 10% of pension and full gratuity by invoking the provisions of rules 43(c) and 43(d) are unsustainable and accordingly directs the respondent authorities to ensure payment of 10% of remaining pension and full gratuity, preferably within a period of eight weeks from the date of receipt/production of a copy of this order.

22. So far the payment of leave encashment is concerned, this field governs by the executive instruction bearing No.4564 dated 06.07.1993. The notification of the State Government clearly stipulates that the leave encashment may be withheld till finalization of departmental enquiry or judicial proceeding in case where there is chance of recovery of defalcated amount after culmination of departmental proceeding or judicial proceeding. Thus, this Court is of the opinion that it is for the Department to consider the claim of the petitioner for leave encashment afresh, as to whether the pending case involves serious allegation of financial irregularity or defalcation, leading to chance of recovery of any amount, and, thereupon, pass a



reasoned and speaking order within the afore-stipulated period.

23. The writ petition stands allowed to the extent indicated hereinabove.

24. There shall be no order as to cost.

(Harish Kumar, J)

Anjani/-

AFR/NAFR	AFR
CAV DATE	22.07.2024
Uploading Date	08.08.2024
Transmission Date	

