IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.826 of 2023
In
Civil Writ Jurisdiction Case No.5005 of 2023

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1. The State of Bihar through Secretary, Water Resources Department, Bihar, Patna.
2. The Secretary, Water Resources Department, Bihar, Patna.
3. The Engineer-in-Chief, Headquarter, Water Resources Department, Bihar, Patna.
4. The Engineer-in-Chief, Flood Control and Drainage, Water Resources Department, Bihar, Patna.

... ... Appellant/s

Versus

1. Tarkeshwar Dhar Dwivedi S/o Late Chandrabhushan Dhar Dwivedi Resident of Bajrangpuri, Flat No.-A/301 Shiv Shankar Apartment, Shiv Mandir Road, Near Shiv Mandir, Sampatchak, Patna, P.S.-Alamganj, District-Patna-800007.
2. The Principal Accountant General (A and E), Bihar, Patna.

... ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Gyan Shankar, A.C. To G.P.-2
For the State	:	Mr. P.K. Shahi, Advocate
For the Respondent No.1	:	Mr. Krishna Kant Choudhary, Advocate
		Mr. Birendra Kant Choudhary, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 22-04-2024

We have heard Mr. P.K. Shahi, learned Advocate General for the appellant State and Mr. Birendra Kant Choudhary, learned Advocate for respondent no. 1.

2. Seeking exception to the order dated 11.04.2023 passed by the learned Single Judge of this Court in CWJC No. 5005 of 2023, the present Letters Patent Appeal has

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been preferred by the State of Bihar. Learned Advocate General, assailing the impugned order, has contended that while disposing of the writ petition, the learned Single Judge directed the concerned State officials to pass final order in the disciplinary proceeding and in the mean time, forthwith release 90% of pension amount, 90% of gratuity and leave encashment to the petitioner.

3. A departmental proceeding was initiated against the writ petitioner respondent herein under Rule 17 of the Bihar Government Servants (Classification, Control & Appeal) Rules 2005 vide resolution contained in memo no. 2291 dated 21.09.2022 on account of certain irregularities in anti-erosion work during the period 2018-2019 while the petitioner was posted as Assistant Engineer in Flood Control Division, Ara. During pendency of the aforenoted departmental proceeding the writ petitioner superannuated on 31.10.2022. Taking note of the pendency of the said proceeding, 90% provisional pension was sanctioned to the petitioner vide letter contained in memo no. 1958 dated 26.10.2022.

4. The petitioner being aggrieved and dissatisfied with the action of the State officials preferred CWJC No. 5005 of 2023 seeking indulgence of the Court for a direction upon the State officials to sanction and make payment

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of 90% gratuity in view of the Full Bench decision of this Court in case of ***Arvind Kumar Singh vs. State of Bihar & Ors. 2018 (2) PLJR 933.***

5. The petitioner further prayed for a direction to take a final decision with regard to the entitlement of the petitioner in terms of Full Bench decision on the issue of leave encashment in view of the fact that there is no allegation of financial irregularities against the writ petitioner in the departmental proceeding.

6. The writ petition came to be disposed of directing the State officials to pass final order in the disciplinary proceeding and in the mean time taking into consideration the Full Bench decision of this Court in ***Arvind Kumar Singh's*** case ***(supra)***. The learned Single Judge held that the authorities cannot withhold entire amount of gratuity and leave encashment payable to the petitioner and hence directed the concerned official respondents to forthwith release 90% pension amount, 90% gratuity and leave encashment to the petitioner.

7. Adverting to the aforesaid facts, the learned Advocate General submitted at the Bar that the learned Single Judge did not appreciate that in view of Bihar Pension (Amendment) Rules 2018 as notified by the Finance Department vide memo no. 77 dated 21.01.2019, the reliance of

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the writ petitioner on the Full Bench judgment in case of ***Arvind Kumar Singh (supra)*** has no application in the present case.

8. The learned Advocate General after taking this Court to the amended provisions has contended that rule 27 of the Bihar Pension Rules 1950 has been substituted by Rule 2 of the Amendment Rules by incorporating that pension includes gratuity except the case under Rule 43(d). It is further contended that by Rule 3 of the Amendment Rules, a new clause (d) has been added in Rule 43 of Bihar Pension Rules which is extracted hereinbelow :-

> "43*(d) -If any departmental or judicial proceeding is pending against the Govt. servant at the time of retirement , full amount of gratuity may be with held till the final conclusion of the departmental or judicial proceeding and issuance of order accordingly...*"
>
> *Provided that where departmental proceeding has been instituted under Rule 19 of Bihar Government Servant (Classification, Control & Appeal) Rules 2005 (as amended from time to time) for imposing minor penalties under Rule 40(i)(ii) and (v) of the said rules. Payment of gratuity may be made to the Government servant.*

9. Learned Advocate General has further taken this Court through the Full Bench decision especially paragraph 29 thereof and submits that it is the mandate of the Full Bench that when an employee is a facing a criminal case or a departmental proceeding, at the time of his retirement, the Government is well within its power to withhold leave

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encashment. Irrespective of the fact that the encashment of leave is governed by the executive or administrative decision of the State Government, so long as the administrative decision to withhold encashment of earned leave subsist, then on the happening of such circumstances as are contemplated, the Full Bench has held that leave encashment can be withheld even in cases where the employee at the time of retirement is facing departmental or judicial proceeding.

10. Refuting the contention of the learned Advocate General representing on behalf of the State officials, the learned Advocate for the writ petitioner respondent submitted that the departmental proceeding was initiated against the writ petitioner for a period of allegation 2018-2019 vide resolution dated 21.09.2022 just before a month of his retirement but subsequently the enquiry-cum- conducting officer has thoroughly considered the materials and on being satisfied with the show cause reply of the writ petitioner, submitted enquiry report showing the charges to be not proved. He would then submit that despite submission of the enquiry report on 31.12.2022 till date, no final decision has been taken by the disciplinary authority.

11. The Full Bench of this Court in the case of ***Arvind Kumar Singh (supra)*** has elucidated that after coming

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into force of the amendment to the pension rules by incorporating rule 43(c) on 19th of July, 2012, an employee who is facing departmental enquiry or judicial proceeding on the date of his superannuation would be entitled to only provisional pension which could include gratuity to the tune of an amount not less than 90%. This was the argument of the learned counsel for the respondent, which is not to say that if the Court decides to withhold gratuity, it cannot be done.

12. It was further argued that there is no statutory provision, rule or regulation provided for encashment of earned leave and once there is no charge of any defalcation or causing loss to the Government exchequer, the State officials were not competent to withhold the leave encashment.

13. Having carefully heard the rival submission of the parties and after perusal of the amended provisions of Bihar Pension Rules, 1950 this Court is of the firm view that rule 43(d) was not under consideration before the Full Bench of this Court in case of ***Arvind Kumar Singh (supra).*** The amended provision was brought in to effect by notification contained in memo no. 77, dated 21.01.2019 whereas the learned Full Bench had rendered the final verdict on 02.05.2018, thus, the amended rule 43(d) was not under consideration.

14. Going through the amended rule 43(d),

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undoubtedly the State is empowered to withhold the full amount of gratuity till the final conclusion of the departmental or judicial proceeding, if the same is pending against the Government servant at the time of retirement. It is the admitted fact that the petitioner superannuated on 31.10.2022 during pendency of departmental proceeding and thus, rule 43(d) shall have the application.

15. Recently the Hon'ble Supreme Court in ***Secretary Local Self Govt. State of Kerela & Ors. Vs. K. Chandran etc., (2022) 12 SCC 104***, while answering the question as to whether on the conviction in a criminal case for violation of integrity norms in performance of official duties and an appeal pending before the High Court, the employee is still entitled to the release of his Death-cum-Retirement Gratuity. The Full Bench of the Kerala High Court ruled in favour of the employees. The Hon'ble Supreme Court highlighting the relevant provisions of Kerala Service Rules and the principles as enunciated in ***Chairman-cum-Managing Director, Mahanadi Coalfields Limited Vs. Sri Rabindranath Choubey [(2020) 18 SCC 71]*** observed that Rule 3A refers to the grant of provisional pension not exceeding the maximum pension which would have been admissible on retirement, where departmental or judicial proceedings have been initiated. It is clearly stipulated that no

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gratuity or DCRG shall be paid until the conclusion of such proceedings.

16. The Hon'ble Supreme Court, reversing the Full Bench decision of Kerala High Court held that the relevant rules must be read in conjunction as they provide for the treatment of the DCRG in case of disciplinary or judicial proceedings pending at the stage of retirement. Even in the absence of these proceedings in certain eventualities the amounts can be recovered from the DCRG. The Hon'ble Supreme Court further held that the pendency of appeal cannot disentitle the State from withholding the DCRG, considering that it is a hiatus period within which certain arrangements have to be made which would be dependent on the outcome of the appeal.

17. Now coming to the issue of leave encashment, the Full Bench of this Court in ***Arvind Kumar Singh (supra)*** made it clear that the executive or administrative decision of the State Government, so long it empowers the State officials to withhold the leave encashment, on the happening of such circumstances, the Government is well within its power in withholding leave encashment.

18. The Finance Department, Government of Bihar vide its circular dated 06.07.1993, which still holds the

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field, directed that if there is least possibility of recovery, on conclusion of such departmental or judicial proceeding/enquiry which could not be completed at the time of superannuation of a delinquent/employee, the competent authority may withhold payment of the amount of earned leave, fully or partly.

19. On both the counts we find that the direction of the learned Single Judge to ensure the payment of gratuity and the leave encashment during the pendency of the departmental proceeding is unwarranted and thus we set it aside. However, we do not interfere with the direction whereby learned Single Judge has directed to pass final order in the departmental proceeding. We thus, direct the State officials to conclude the same within a period of three months from today. Needless to observe that the payment of gratuity and the leave encashment, shall abide by the final outcome of the departmental proceeding.

20. At this stage, Mr. Bindhyachal Singh, learned Senior Counsel presses the interlocutory application on behalf of intervenor petitioners. It is his contention that since the case of the intervenor petitioners have been allowed in terms of the order dated 11.04.2023 passed in CWJC No. 5005 of 2023, the intervenor petitioners are likely to be affected by the outcome of the present Letters Patent Appeal and thus being interested parties, they may be allowed to assist this Court in

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reaching a just conclusion.

21. This Court is not persuaded by the contention of the intervenor petitioners.

22. The intervenor application stands dismissed.

23. The Letters Patent Appeal stands allowed to the extent indicated hereinabove.

(K. Vinod Chandran, CJ)

(Harish Kumar, J)

supratim/-

AFR/NAFR	AFR
CAV DATE	NA
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