**(2004) 10 PAT CK 0016**

**In the Patna High Court**

**Case No :** CWJC No. 11934 of 2003

Bishwambhar Prasad Srivastava APPELLANT

Vs

The State of Bihar and Others RESPONDENT

**Date of Decision :** 12-10-2004

**Acts Referred:**

**Citation :** (2005) 2 PLJR 37

**Hon'ble Judges :** Mridula Mishra, J

**Bench :** Single Bench

**Advocate :** A.K. Sinha, No. 1, R.N. Prasad, for the Appellant; S.P. Verma for State, for the Respondent

**Final Decision :** Allowed

## Judgement

Mridula Mishra, J.—Heard Learned Counsel for the petitioner, counsel for the State and the Accountant General. Petitioner is aggrieved by the order contained in letter No. Pan-3-1736 dated 17.1.2002 (Annexure-4) issued by Senior Accounts Officer, Bihar, Patna, (Respondent No. 5), by which the papers submitted by the petitioner for fixation of his final pension, gratuity and commutation pension has been returned on the ground that the petitioner after his promotion to the post of correspondence clerk did not pass the departmental examination, which was essential, as such the Finance Department has not approved his promotion for fixation of pension in that scale. By this letter Respondent No. 4 has been requested to make necessary deduction from petitioner''s pension for adjustment of excess amount paid as salary since 1989. Further prayer is for quashing the order dated 29.9.2003 contained in Memo No. 1152 (Annexure-5) issued under signature of Executive Engineer (Respondent No. 4), whereby and whereunder Treasury Officer has been directed to deduct the amount of Rs. 82,122/- from the commuted pension of the petitioner and also for deduction of pension and gratuity earlier paid to the petitioner in promotional scale.

2. Petitioner was appointed as Work Charge Employee in the year 1968. By order

 

dated 28.12.1979 his service was regularised on the post of Lower Grade Clerk. On the basis of the order passed vide memo No. 3329 dated 26.11.1985 the service of the petitioner was treated as a permanent employee of the department on the post of correspondence clerk with effect from 31.12.1982. The petitioner appeared in the Departmental Accounts Examination for the first time in the year 1987 but he could not succeed in the examination. Again he appeared in the examination in the year 1988 and passed in first paper final and second paper preliminary. By order of respondent No. 3 the petitioner was given 1st time bound promotion with effect from 31.12.1989. This promotion was given provisionally subject to confirmation by the Finance Department. Thereafter, Finance Department confirmed his first time bound promotion and revised his salary vide memo No. 660 dated 8.2.1999 with effect from 1.1.1996. On 31.7.2002 he retired from service and he was paid G.P.F., leave encashment, 90% gratuity and provisional pension. Petitioner thereafter applied for commutation of pension and also for fixation of final pension and gratuity. Respondent No. 4 sent a letter vide No. 1263 dated 20.11.2002 to the Accountant General, Bihar, for issuance of authority slip for commutation of pension, final pension and gratuity. The Senior Accounts Officer, Bihar, Patna, by order dated 17.1.2003 returned the documents to respondent No. 4 stating that since petitioner did not pass the Departmental Accounts examination, as such, he is not entitled for promotion as per letter No. 4178 dated 18.8.1992 of the Department of Finance by which it has been made essential for every employee to be promoted in clerical cadre since 1.9.1983 to pass Departmental Accounts Examination. Petitioner did not pass the Departmental Accounts Examination even then he was given time bound promotion, for which he was not entitled.

3. Finance Department vide letter No. 3378 dated 29.7. 2002 has not approved the fixation of pension on the basis of promotion given to him, as such the amount paid as salary on account of wrong promotion showed be adjusted, in the light of the order of Finance Department fresh sanction order should be issued for necessary action.

4. A counter-affidavit has been filed by respondent-State wherein it has been stated that the petitioner has passed the final examination of first paper and preliminary examination of second paper but he did not pass the final examination of second paper, as such, he was not entitled for promotion. Promotion given to him and salary paid in the promotional scale is excess amount paid to him, which has to be refunded by him.

5. It has been submitted by the Learned Counsel for the petitioner that it has been decided by this Court as well as by the Apex court that any increment or salary paid to a Government employee by a competent authority cannot be recovered from his pensionary benefits after his superannuation when there is no fault or misrepresentation on the part of the employee. Petitioner has also referred the Government circular No. 11691(Ka) dated 9.11.1983 regarding exemption from passing departmental examination if a Government servant has

 

crossed the age of 50 years and if successively appeared in examination but did not pass the departmental examination. As per this circular in such case the employee will be exempted from clearing the departmental examination. In the case of the petitioner also he appeared in the examination, he cleared some of the papers but the entire departmental examination he could not clear. After crossing the age of 50 years he is entitled for exemption as per the Government circular.

6. Learned Counsel for the State has submitted that in this particular case promotion was given to the petitioner provisionally subject to the confirmation by the Finance Department. There is no illegality in the order passed by the Accountant General. Similar statements have been made by the Learned Counsel for the Accountant General.

7. On consideration of entire facts I find that the order which has been issued by the Senior Accounts Officer in letter dated 17.1.2003 is fit to be quashed as no deduction can be made from the petitioner''s pensionary benefits as payment was not made to the petitioner on the basis of any foul play and misrepresentation on the part of the petitioner. The circular No. 1/961 dated 9.11.1983 of the Government is also applicable in the case of the petitioner as the petitioner successively appeared in the departmental examination but did not pass in the examination. After completion of 50 years of age he became entitled for relaxation and exemption from passing the departmental examination. In this view of the matter, the promotion given to the petitioner cannot be cancelled on account of non-passing of the Departmental Accounts Examination and the promotion given cannot be treated to have been granted provisionally. After his retirement, promotion granted, cannot be cancelled, on this ground.

8. In the facts and circumstances, the order dated 17.1.2003 (Annexure-4) and order dated 29.5.2003 (Annexure-5) are hereby quashed. The Accountant General Bihar, Patna, is directed to fix the final pension and gratuity of the petitioner on the basis of last pay drawn by him before superannuation. The treasury officer (Respondent No. 4) is directed to pay the commuted pension amount to the petitioner without any deduction. If any deduction has been made, same may be refunded to the petitioner within one month. Final fixation of gratuity and pension in favour of the petitioner must be made within one month from the date of presentation/communication of a copy of this order on the basis of last pay drawn. Payment of entire retiral dues should be made within two months from the date of production/communication of a copy of this order. With the aforesaid observation/ direction this application is allowed.

 