(2009) 08 JH CK 0001

In the Jharkhand High Court

Jagannath Prasad Sahu APPELLANT

Vs

State of Jharkhand and Others RESPONDENT

Date of Decision : 28-08-2009

Acts Referred:
Jharkhand Pension Rules, 2000 — Rule 197A(i)

Citation : (2009) 08 JH CK 0001

Hon'ble Judges : D.G.R. Patnaik, J

Bench : Single Bench

Judgement

D.G.R. Patnaik, J.—Heard learned Counsel for the parties.

2. The petitioner in this writ petition has prayed for a direction to the respondents to fix his final pension on the basis of the last pay drawn by him as Assistant Teacher In charge Head Master and also to pay full pension amount with admitted benefits, dearness allowance, etc.

3. Facts of the case of the petitioner, in brief is as follows:

4. The petitioner was appointed as Assistant Teacher in a Primary School on 14.2.1963 and he superannuated from service with effect from 30.9.2004 while posted as In charge Head Master of Middle School, Arey. Prior to his retirement, he was granted the pay scale of Rs. 5500-9000/- and together with amount of dearness allowance etc. he used to draw salary of Rs 12,713/- per month which was the last pay drawn by him.

Upon his retirement, he had submitted the requisite papers for computation of his pension and other retiral benefits. The concerned authorities of the respondents had forwarded his service book along with his pension papers and the proposal for final sanction of pension to the office of the Accountant General, (respondent 4) on 18.6.2005. However, the service book together with pension papers were returned by the office of the respondent No. 4 with certain queries asking for re-submission of the same after making clarification on the objections raised.

5 As per petitioner''s information, the District Superintendent of Education (respondent No. 2) had re-submitted the service book along with clarification sought for, on 9.3.2006, but thereafter the office of the respondent No. 4 has failed to fix final pension of the petitioner.

6 In the counter affidavit filed on behalf of the respondent No. 2, while acknowledging the aforesaid facts stated by the petitioner, it has been stated that the queries raised by the office of the Accountant General has been answered and thereafter the proposal for pension along with service book and other relevant papers were forwarded to the office of the respondent Accountant General to correct the defects, if any, which might still persist and to pass order on the final pension of the petitioner.

7 Counter/affidavit has been filed on behalf of the respondent No. 4 explaining therein that the pension of the petitioner is to be finalized by the office of the respondent No. 4 on the basis of the admissible pay scale. The office of the Accountant General has a statutory duty under Rule 197A(i) of the Jharkhand Pension Rules, 2000, to check and verify the documents forwarded by the department and if any discrepancy is noticed, the same is returned under Rule 200 for correction or explanation.

In the present case, the office of the Accountant General returned the service book; and pension paper of the petitioner to the concerned department on 4.10.2005 with the request to clarify as to under which Rule was the benefit of the pay scale of Rs. 5000- 9000/- granted from 1.1.1997 since it appeared that it was not in consonance with the Rules relating to the grade promotion which was introduced from 1.1.1986. It is also pointed out that instructions contained in the Bihar Takeover of the Elementary School Teachers Promotion Rule 1993 and the clarifications submitted by the Director, Primary Education, Bihar No. 2744 dated 19.12. 1995(annexure 2) should be. taken before re-submission of the documents.

8. Further stand taken by the respondent No. 4 is that the petitioner cannot claim, as a matter of right, that his pension must be fixed on the basis of the last pay drawn by him merely on the ground that the benefit of pay has not been derived by him by practising fraud or any misrepresentation. A mistake cannot create a right and no estoppel can exist against any mistake and that the mistake should not be perpetuated and the court may not be a party to such an illegality on the ground of hardship.

9 Heard teamed Counsel for the petitioner and the learned Counsel for the State and learned Counsel for the respondent No. 4.

10 From the rival submissions, the undisputed facts which emerge are:

(i) that the petitioner having discharged satisfactory duties retired from the post of Incharge Headmaster of the middle school.

(ii) He was granted pay scale of Rs. 5500- 9000/- and on such scale, together with dearness allowance, the salary paid to him qn the date of retirement was Rs. 12,730/-.

(iii) The. petitioner submitted his pension papers and

other documents for computation of pension;

(iv) Pension papers along with the relevant documents and pension proposal by the superior in office (DSE) were forwarded to the office of Accountant General;

(v) Pension papers were returned to the respondent No. 2 raising a query and seeking a clarification as to the basis of fixation of pay scale of Rs. 5500-9000/- w.e.f. 1.1.1997.

As per the statement of respondent No. 2, clarification on the queries sought for was made and the pension papers along with service book of the petitioner was re-submitted to the office of the Accountant General in March, 2006 explaining therein that the pay fixation on the aforesaid pay scale with effect from 1.1.1997 was made in favour of the petitioner on the basis of the Fundamental Rule 22C.

11 The petitioner has demanded fixation of pension on the basis of the last pay drawn by him claiming that pay scale which was fixed and on the basis of which the pay was sanctioned to him, cannot be now altered since the petitioner did not derive benefit of the scale by practising fraud or misrepresentation before the concerned authorities and more over since no proceedings were initiated against the petitioner under the provision of Rule 43B of the Jharkhand Pension Rules.

12. Controversy raised on behalf for the respondent No. 4 is to the petitioner''s Stand that his pension has to be fixed invariably on the basis of the last pay drawn by him and that even if there was any error in fixation of the scale the same cannot be rectified

13. In the present case, as it appears, pension has not been fixed as yet. Even though as per the clarification offered by the respondent No. 2, there is no error or mistake in grant of scale of Rs. 5500-9000/- to the petitioner from the date where it was made effective. No reason has been assigned by respondent No. 4 as to why pension of the petitioner should not be fixed on the basis of the last pay drawn by him.

14. Law is well settled that pension of a Government servant is to be fixed on the basis of the fast way drawn by him, unless, of course, it is shown that such fixation of pay-was erroneous and to which the Government servant was not legally entitled.

15. A Division Bench judgment of the Patna High Court in the case of State of Bihar v. Smt Shiv Rani Devi 1998(1) PLJR 409 declares that the last pay drawn by an employee would be the basis according to the provisions of Rule 136, read with section 151 of the Bihar pension Rules for the purpose of fixation of pension of the employee.

16. It is not the case of the respondents that the benefit of the scale fixed for the petitioner and made effective from 1.1.1997 was derived by the petitioner by practising fraud or misrepresentation. Rather, as per the clarification offered by the respondent No. 2 with reference to the Fundamental Rule 22C such scale was rightly fixed for the petitioner and he was admittedly allowed to raw salary on the basis of the aforesaid scale till the date of his retirement. On these facts, the petitioner claims for fixation of pension on the basis of the last pay drawn by him. As it appears, the petitioner retired from service on 30.9.2004. The benefit of the scale was given to him from 1.1.1997. No proceeding under Rule 43 of the Pension Rules was initiated against the petitioner at any time.

17. There could be no dispute to the proposition that the Office of the Accountant General has the statutory duty under Rule 197(a)(i) of the Pension Rules to check and verify the documents forwarded by the Department and to fix pension of the Government servant. Pension which is certified by the Accountant General has to be such as could be clearly and strictly admissible to the Government servant under the Pension Rules. Pension Rules do not stipulate that the pension should invariably be fixed on the basis of the last pay drawn by the retired Government servant even if it is detected that he is not entitled to such scale and, that the scale on the basis of which the last pay was drawn, was wrongly conferred by the Department. Such error, if any, can certainly be rectified in accordance with the actual entitlement of an employee on the basis of the Pension Rules. This view finds support from the judgment of the'' Supreme Court in the case of Union of India and Others Vs. Rakesh Kumar etc., and in the case of Union of India and Others Vs. Smt. Sujatha Vedachalam and Another, and in the recent judgment of the Division Bench of this Court in the case of State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, and also by single Bench judgment in the case of Bhora Prasad Chaudhary v. State of Jharkhand 2005 (3) JLJR 553.

18. Thus Rule, however, has to be construed as qualified by the condition that if the proposed correction leads to the consequence of decreasing the pay scale and consequent benefits, then before proceeding to rectify the purported error, the employee'' has to be given prior notice and a reasonable opportunity of being heard. Furthermore, even if on account of the error, the employee had drawn excess payment, such excess amount cannot be recovered from his retiral benefits without resorting to the provisions of Rule 43B of the Pension Rules.

19. As observed above, in the present case, going by the clarification offered by the respondent No. 2, the pay scale fixed for the petitioner, was in accordance with the Fundamental Rule 22C. Apparently, the respondent No. 2 was satisfied that the pay scale fixed and allowed to the petitioner from the date it was made effective, was correct. Respondent No. 4 has not taken any final decision on the basis of the clarification offered.

20. Under such circumstances, respondent No. 4 is directed to take a decision on the petitioner''s claim for fixation of his pension on the basis of the last pay

drawn by him and if the petitioner is found entitled to such claim, then to fix the pension of the petitioner and to ensure that pension amount is paid to the petitioner without any further delay. The decision on the petitioner''s claim has to be taken by respondent No. 4 within two months from the date of receipt/ production of a copy of this order.

With the above observations, this application is disposed of.

Let a copy of this order be given to the learned Counsel for the respondents.

