

(2021) 02 PAT CK 0132

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 7961 Of 2020

Kailash Bhushan Tiwari

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 12-02-2021

Acts Referred:

Bihar Pension Rules, 1950 — Section 202, 202(1)
Constitution Of India, 1950 — Article 12, 14, 142, 226

Citation : (2021) 02 PAT CK 0132

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Rakesh Kumar Sharma, Y.P. Sinha, Vinay Kirti Singh

Final Decision : Dismissed

Judgement

1. Essential facts relevant for adjudication of the present case are not at all in dispute.

2. On attaining the age of superannuation, the petitioner retired as Junior Electrical Engineer, Electric Supply Division, Buxar under the erstwhile Bihar

State Electricity Board with effect from 31.07.2002. The Bihar State Power (Holding) Company Limited (hereinafter referred to as "the

Company") is the successor body of the establishment from where the petitioner demitted his office on his retirement. His monthly pension was

fixed at the rate of Rs. 6,480/- on the basis of his pay admissible to him as on the date of his retirement under the 5th Pay Revision. His monthly

pension was revised with effect from 01.04.2007 at Rs. 14,645/- under 6th Pay Revision and a Pension Payment Order was accordingly issued on

04.11.2011. He, however, received monthly pension at the rate of Rs. 16,465/- per month instead because of a wrong entry. On introduction of 7th

Pay Revision, the petitioner's monthly pension was revised treating his pension at the rate of Rs. 16,465/- per month instead of Rs. 14,645/- per

month. This led to payment of pension to the petitioner in excess of what he was legally entitled to receive.

3. The Respondent-Company has taken steps to recover the amount from the petitioner's pension on monthly installment till the excess amount

paid to the petitioner is fully recovered. It appears from the pleadings on record that the petitioner was getting pension of Rs. 46,572/- per month. It is

his case that without any prior intimation, in the month of December 2019, a sum of Rs. 22,940/- was deposited in his pension account. It is his case

that he learnt about the decision of the Respondent-Company to recover excess amount paid to the petitioner, because of which less amount of

monthly pension was deposited in his account in December 2019, on the basis of information furnished to him by the Company under the Right to

Information Act, 2005. The said action of the respondents to recover the amount paid to the petitioner in excess as monthly pension has been

impugned in the present writ application.

4. I have heard Mr. Rakesh Kumar Sharma, learned counsel appearing on behalf of the petitioner and Mr. Vinay Kirti Singh, learned Senior Counsel

representing the Respondent-Company.

5. Mr. Sharma, learned counsel appearing on behalf of the petitioner has placed reliance on Supreme Court's decision in case of State of Punjab

and others vs. Rafiq Masih(White Washer) and others reported in (2015) 4 SCC 334 [apparently incorrect citation of the case has been mentioned in

paragraph-16 of the writ application as (2014) 8 SCC 883], in support of his contention that as the excess payment has been made for a period in

excess of five years, recovery is impermissible in view of the directions issued in paragraph-18 thereof. He has argued that evidently the decision to

recover the amount has been taken without giving the petitioner any opportunity of hearing, and, therefore, such action is in breach of the principles of

natural justice. It is his contention that the petitioner did not play any role in payment of excess pension, over and above, what was sanctioned by the

respondents and in the absence of any fraud or misrepresentation alleged against the petitioner, decision to recover the amount from the

petitioner's pension is arbitrary, illegal, unreasonable and iniquitous.

6. Mr. Vinay Kirti Singh, learned Senior Counsel appearing on behalf of the Respondent-Company, on the other hand, has referred to Rule 202 of the Bihar Pension Rules, 1950 (hereinafter referred to as "the Rules") which indisputably governs payment of pension to the petitioner and other employees of the Board/ Company to submit that in case the amount of pension granted to an employee is found to be in excess of that to which he is entitled under the Rules, he has to be called upon to refund such excess. Referring to the counter affidavit filed on behalf of the respondents, it has been argued that it was a mere clerical error that a sum of Rs. 16,465/- per month was being deposited in the petitioner's pension account in place of 14,645/- and it was well within the knowledge of the petitioner that the amount, which was being deposited in the petitioner's pension account, was more than what was sanctioned to him. Referring to letter No. 5718 dated 04.11.2011 (Annexure-A to the counter affidavit) whereby petitioner's pension was revised from Rs. 6,480/- to 14,645/-, he has submitted that a copy of the said letter was communicated to the petitioner also. He, however, continued receiving more amount of pension than what he was entitled to and he thus knowingly received a total sum of Rs. 4,60,632/- in excess of what he was entitled to under the Rules. He has further submitted that in accordance with requirement of Rule 202 of the Rules the petitioner was given a notice through letter dated 27.11.2019 asking him to refund the said excess amount. As the petitioner failed to refund the amount, in tune with the provisions under Rule 202 of the Rules, the Respondent-Company ordered that excess payment shall be adjusted by short payment of pension in installments. According to him, the Supreme Court's decision in case of Rafiq Masih (supra) has no application in the facts and circumstances of the present case where the petitioner knowingly received more amount than what was authorised to be paid to him against pension, taking advantage of a minor typographical error. He has also submitted with reference to the averments made in the counter affidavit that the petitioner had given a clear undertaking at the time of initial sanction of pension that if payment was found to be in excess of that to which he was entitled under the Rules he would refund the amount paid to him in excess.

7. In reply to the aforementioned submission, learned counsel for the petitioner has submitted that the said undertaking was given by the petitioner at

the time when the pension was initially sanctioned to the petitioner at the rate of Rs. 6,480/- per month after his superannuation. He has argued that at

the time of subsequent revision with issuance of Memo No. 5718 dated 04.11.2011, no such undertaking was given by the petitioner, and, therefore,

the undertaking given by him in 2001 cannot be made the basis for recovery of the excess payment. He has reiterated his submission that the

petitioner's case is squarely covered by 3rd situation enumerated in paragraph 18 of the Supreme Court's decision in case of Rafiq Masih (supra)

wherein it has been laid down that recoveries by employers, would be impermissible in law (iii) -----when excess payment has been made for a

period in excess of five years, before the order of recovery is issued.

8. To appreciate the rival contentions on behalf of the parties, it would be apt to reproduce Rule 202(1) of the Rules, to begin with, which reads as

under :-

202.(1) Should the amount of pension granted to a Government servant be afterwards found to be in excess of that to which he is entitled

under the rules, he shall be called upon to refund such excess. [For this purpose the Government servant concerned shall be served with a

notice by the pension sanctioning authority, requiring him to refund the excess payments within a period of two months from the date of

receipt by him of the notice. On his failure to comply with the notice the pension sanctioning authority shall order that such excess payments

shall be adjusted by short payments of pension in future, in one or more instalments, as the authority may order.]

9. In place of the expression "Government Servant" occurring in Rule 202 of the Rules, expression "employee" is being mentioned

hereinafter since the Rules framed for the "Government Servants" in the State of Bihar has been admittedly made applicable to the employees

of the Company.

10. A note below Rule 202(1) prescribes that for the purpose of the said Rule, a declaration in the Form appended as Annexure-A shall be obtained

from the retiring employee by the authorities sanctioning payment, before pension is sanctioned. Annexure-A, inter alia, requires giving an undertaking

in the nature of promise to refund amount paid to a pensioner in excess of that to which he may be eventually found entitled. Rule 202, in the

Court's opinion, applies when the pension granted to an employee is found to be in excess of that to which he is entitled to under the Rules. The

undertaking in Form appended as Annexure-A requires a declaration that the pension granted is subject to refund if the same is found to be in excess

of that to which an employee is entitled to under the Rules. Rule 202(1) contemplates a situation where because of wrong fixation of pension more

pension is granted to an employee than what he is entitled to under the Rules. If, afterwards, it is found by the employer sanctioning pension that the

grant of pension was more than what is permissible under the Rules, a pensioner cannot raise any objection to refund of pension in view of the

undertaking given in the Form appended as Annexure-A to Rule 202(1) of the Rules. There is further undertaking required to be given by the retiring

employees in the nature of promise to refund the amount paid to him in excess of that to which he might be eventually found entitled.

11. In the present case, the situation is entirely different. The amount of pension granted to the petitioner was not in excess of that to which he was

entitled under the Rules. He was granted monthly pension at the rate of Rs. 14,645/- with effect from 01.04.2007 with the issuance of Pension

Payment Order dated 04.11.2011. Payments were made, however, in his pension account at the rate of Rs. 16,465/- per month because of an

incorrect entry. It was clearly within the knowledge of the petitioner that a sum of Rs. 14,645/- was granted as monthly pension by virtue of Pension

Payment Order dated 04.11.2011. It was clearly within his knowledge that the amount of monthly pension, which was being deposited in his account,

was more than the pension granted to him. At the cost of repetition, it is recorded that it is not a case of wrong fixation of pay or pension because of

which the petitioner received more amount than what he was legally entitled to. It is a case of more amount being deposited in the employees's

pension account by mistake, despite his pension having been rightly fixed and granted. The question arises as to whether this Court exercising power

of judicial review under Article 226 of the Constitution of India should interfere with the decision of the Company which is State within the meaning of

Article 12 of the Constitution of India, to recover the amount wrongfully credited in the petitioner's pension account, in excess of the amount of

pension granted to him ?

12. In case of Rafiq Masih (supra) (paragraph-6), the Supreme Court had proceeded to lay down parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. The Supreme Court in case of Rafiq Masih (supra) ruled in no uncertain terms in paragraph 6 that such benefits cannot be extended to an employee merely on account of the fact that he was not an accessory to the mistake committed by the employer, or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying employee more than what was rightly due to him; or for that matter, merely because of excessive payment was made to the employee in absence of any fraud or misrepresentation at the behest of the employee. The Supreme Court held in paragraph 7 in case of Rafiq Masih (supra) that orders passed by the employer seeking recovery of monetary benefits wrongfully extended to the employee can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. The Supreme Court went on to clarify and hold that such interference would be called for only in such cases where it would be iniquitous to recover the payment made. It can be easily culled out from paragraph 11 of the Supreme Court's decision in case of Rafiq Masih (supra) that the employees in the batch of cases before the Supreme Court were given monetary benefits which were in excess of their entitlements. It is further evident that the monetary benefits had flown to them consequent upon a mistake committed by the competent authority concerned in determining the emoluments payable to them. The mistake, the Supreme Court noted in case of Rafiq Masih (supra), could have occurred on account of variety of reasons including :

- (i) Grant of status, which the employee concerned was not entitled to.
- (ii) Payment of salary in a higher pay-scale than in consonance with the right concerned.
- (iii) Because of wrongful fixation of salary of the employee, consequent upon pay revision of pay scales.
- (iv) Having granted allowance for which the employee concerned was not authorised.

13. The aforesaid category of mistakes set forth by the Supreme Court are apparently not exhaustive and are inclusive. The Supreme Court noticed

the broad aspect of the matter of the cases where government servants were beneficiaries of the mistake committed by the employer and on account

of said unintentional mistake, the employees were in receipt of monetary benefits beyond their due.

14. In my opinion, in the nature of dispute, which has emerged in the present writ application, the case of the petitioner cannot be said to be squarely

covered by the Supreme Court's decision in case of Rafiq Masih (supra) for the reason that the present case does not involve wrongful fixation or

grant of emoluments or benefits. The fixation was rightly done. The petitioner was fully aware of the amount of monthly pension granted in his favour

upon revision with the issuance of Pension Payment Order dated 04.11.2011. However, the amount credited in his pension account was more than the

amount of pension granted to him.

15. It is noteworthy that the Supreme Court in case of Shyam Babu Verma vs. Union of India reported in (1994) 2 SCC 521 had noticed that the

petitioners of the said case were paid their salaries in higher pay-scale than they were actually entitled to with effect from 01.01.1973. The

discrepancy was noticed in 1984 and accordingly the scale was reduced with effect from 01.01.1973. In such given case, the Supreme Court

restrained the respondents of that case from recovering any excess amount already paid to them. Considering the decision in case of Shyam Babu

Verma (supra), the Supreme Court held in paragraph 14 in case of Rafiq Masih (supra) that recovery of excess payment discovered after five years

would be iniquitous and arbitrary and, therefore, violative of Article 14 of the Constitution of India. The case situation in case of Shyam Babu Verma

(supra) was that fixation of salary was found incorrect and payments were made to the employees who had received payments on the basis of

incorrect fixation and mistake in fixation of pay/ salary was discovered after 11 years.

16. In the present case, on the other hand, it was well within the knowledge of the petitioner that the amount, which he was receiving, was more than

the amount of pension which was granted to him.

17. It would be beneficial to notice the case of B.J. Akkara vs. Government of

India reported in (2006) 11 SCC 709, wherein the Supreme Court has clearly viewed that the nature of relief restraining back recovery of excess payment is granted by Courts not because of any right of the employees, but in equity in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. If an employee receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. In such circumstances, any subsequent action to recover excess payment shall cause undue hardship and, therefore, relief is granted in that behalf, the Supreme Court observed in case of B.J. Akkara (supra). Paragraph 28 of the said judgment can be usefully reproduced hereinbelow, which reads as under :-

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery.

18. Referring to the enunciation of law in case of B.J. Akkara (supra), the Supreme Court in case of Rafiq Masih (supra) has noted in paragraph 15 that the right to recover would be sustainable so long as the same was not iniquitous or arbitrary. The Supreme Court, accordingly, held in paragraph 15 in case of Rafiq Masih (supra) that recovery from employees belonging to lower rung of service should not be subjected to ordeal of any recovery even though they were beneficiaries of receiving higher emoluments.

19. In case of Syed Abdul Qadir vs. State of Bihar reported in (2009) 3 SCC 475,

the Supreme Court noticing excess payment made as a result of wrong interpretation of statutory Rule for which the government servants could not be held responsible, rather since whole confusion was found to have been created because of inaction, negligence, carelessness of the officials concerned. The Supreme Court keeping in mind the peculiar facts and circumstances of that case had restrained the respondents from recovery of amount that had been paid in excess to the appellant teachers. Noticing the said directive issued in case of Syed Abdul Qadir (supra), the Supreme Court in case of Rafiq Masih (supra) held in paragraph 16 that "recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement or soon before retirement".

20. One needs to bear in mind that the Supreme Court decided to lay down the parameters where recoveries could be held to be impermissible, by referring to the various situations when the Supreme Court in various cases had exempted the employees from such recoveries, even in exercise of its jurisdiction under Article 142 of the Constitution of India. The Supreme Court observed that repeated exercise of such power under Article 142 of the Constitution of India "for doing complete justice in any case" would establish that the recovery being effected was iniquitous and, therefore, arbitrary. This is precisely the background in which the Supreme Court has set out the parameters in paragraph 18 which reads as under :-

"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to

discharge duties of a higher post, and has been paid

accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or

arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.â??

21. Facts of the present case, in the Courtâ??s opinion, are different. The fixation of the petitionerâ??s pension in 6th Pay Revision with effect from

01.04.2007 with the issuance of Pension Payment Order dated 04.11.2011 at the rate of Rs. 14,645/- was correct. The order granting pension at the

rate of Rs. 14,645/- was communicated to the petitioner. He, however, received more pension than that was granted to him which was erroneously

credited in his account at the rate of Rs. 16,465/- per month. He was apparently aware of the fact that more amount was being credited in his pension

account than that was sanctioned to him. Merely on account of fact that the petitioner was not an â??accessory to the mistake committed by the

employerâ?? leading to payment of more amount than the petitioner was rightfully entitled to; action of the respondents to recover excess amount

credited in the petitionerâ??s account shall not require this Courtâ??s interference. It is only when the Court reaches a conclusion that recovery

would result in a hardship of a nature â??which would far outweigh, the equitable balance of employerâ??s right to recoverâ??, that an interference

with the action of the employer seeking recovery of excess monetary benefits wrongfully extended to the petitioner can be interfered with [see Rafiq

Masih (supra) paragraph-7]. An action of the State within the meaning of Article 12 of the Constitution of India ordering recovery from an employee,

would be in order, so long as it is not rendered iniquitous to the extent that the action of the recovery would be more unfair, more wrongful, more

improper and more unwarranted than the corresponding right of the employer, to recover the amount. [see Rafiq Masih (supra) paragraph-10].

22. The petitioner, in all fairness, ought to have brought to the notice of the employer or the banker that the amount, which was being deposited in his

pension account, was more than the rate of pension granted in his favour with the issuance of Pension Payment Order dated 04.11.2011. He, instead,

cleverly and silently kept on receiving the amount knowing well that the same was more than his actual entitlement.

23. In such circumstance, the decision of the respondents to recover the amount cannot be termed as iniquitous requiring this Court's interference.

24. I accordingly do not find any merit in this application. This application is dismissed.