(2010) 06 JH CK 0033

In the Jharkhand High Court

Case No : Writ Petition (S) No. 158 of 2008

Kapildeo Mondal APPELLANT

Vs

The State of Jharkhand and Others RESPONDENT

Date of Decision : 25-06-2010

Acts Referred:

Bihar Pension Rules, 1950 — Rule 43
Bihar/Jharkhand Pension Rules, 1950 — Rule 43(b)
Constitution of India, 1950 — Article 102, 309
Jharkhand Government Primary School Teachers (Transfer and Disciplinary Action) Rules 1994 — Rule 8(2)

Citation : (2010) 58 BLJR 898

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

Bench : Single Bench

Advocate : Manoj Tandon, for the Appellant; D.K. Dubey, S.C. (Mines) and Sudarshan Shrivastava, for the Respondent

Judgement

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

2. The petitioner in this writ application has prayed for a direction upon the respondents to fix and pay the pensionary benefit of the petitioner on the basis of the pay scale of Rs. 8,000/- which was the last pay drawn by him during his service and not to make any recovery from the pensionary/terminal benefits of the petitioner. A further prayer has been made to direct the respondents to refund the recovered amount of Rs. 2,93,591/-.

3. The main questions which have been raised by the petitioner are:

(i) Whether any recovery can be made from the pensionary/terminal benefits of the petitioner after his retirement without there being any finding of any misconduct in the departmental proceeding or criminal case against him.

(ii) Whether the pension of the retired employee has to be fixed on the basis of the scale to which the petitioner was entitled to or on the basis of the last pay drawn by him ?

4. Both the above issues have, by now, been well settled by a catena of Judgments of the Supreme Court as well as Judgments of this Court to which I shall refer hereinafter but before that, a brief note of the petitioner''s case would be necessary.

5. The petitioner retired from service as Assistant Teacher from Middle School, Sonadhani, in the district of Pakur on 31.10.2006.

During his service period, his pay was fixed at the scale of Rs. 8,000/- as on 01.09.2005 and thus, on the date of his retirement, he continued to avail the pay of Rs. 8,000/- per month.

The dispute arose when the respondents sought to fix the petitioner''s pension on the scale of Rs. 6,950/-.

The petitioner had therefore challenged the order dated 04.09.2007 passed by the District Superintendent of Education, Pakur whereby the petitioner''s pay scale was fixed at a reduced scale of Rs. 6,950/- and the corresponding order for recovery of the purported excess paid amount from the petitioner''s retiral benefits.

6. It appears that during the pendency of this writ application, the respondents had proceeded to recover a sum of Rs. 2,93,591/- from the retiral benefits of the petitioner. The petitioner has challenged the aforesaid order of recovery seeking refund of recovered amount.

7. In their attempt to justify their stand of fixing the pay of the petitioner at a lower scale and also for directing the recovery of the purported excess paid amount from the petitioner''s retiral benefits, the stand taken by the Respondent Nos. 3 and 4 is that it was subsequently detected that the pay of the petitioner in the I.A. Trained scale was wrongly fixed from 01.04.1982. Even the Matric Trained revised pay scale fixed with effect from 1981 was also illegal. The promotion which was granted to the petitioner was contrary to the procedure laid down by law and circulars of the concerned department in as much as, the promotion of the teachers in the I.A. Trained scale which ought to have been given against available vacancies, was wrongly given to the petitioner and several other teachers in 1987-88 with retrospective effect that too without obtaining the approval of the District Education Establishment Committee. It is further contended that upon detection of the illegality, a proceeding for recovery of the excess paid amount was initiated by the Director, Primary Education, Bihar Patna during the service period of the petitioner. During the enquiry, it was found that in the district of Sahibganj there were only 184 posts in the general category for I.A. Trained teachers but a total number of 219 teachers were promoted illegally beyond the available vacant posts by the then District Superintendent of Education, Sahibganj. It is further contended that since the proceeding for recovery of the excess paid amount was initiated even during the period of the petitioner''s tenure in service, the petitioner cannot object to the recovery of the excess amount which he had received. It is further contended

that while initiating the enquiry, the petitioner was given a show cause notice but he failed to respond.

8. The petitioner has assailed the impugned order of fixation of his pay at a lower scale and the impugned order or recovery of the purported excess paid amount on the following grounds:

(i) Admittedly no departmental proceeding was ever initiated against the petitioner. The notice, as claimed by the respondents to have been served upon the petitioner, does not even remotely suggest that it was by way of a memo of charge or in the context of any contemplated departmental proceeding. In fact no memo of charge was ever served upon the petitioner either during the period of his service or after his retirement.

(ii) The promotion which was admittedly granted to the petitioner in the I.A. Trained scale from 01.04.1982 if taken away, would amount to demotion/ reversion of the petitioner. Such demotion/reversion constitutes a punishment in terms of Rule 8(2) (i) of the Jharkhand Government Primary School Teachers (Transfer and Disciplinary Action) Rules 1994, which have been framed under the proviso of Article 102 and 309 of the Constitution of India. Reversion under the Rules is a major punishment for which a departmental proceeding, before imposing such punishment, is a sine qua non. Since no departmental proceeding was ever initiated against the petitioner, there was no occasion to enable the petitioner to submit his explanations as to why the proposed major punishment should not be imposed against him.

To buttress his arguments, learned Counsel would refer to and rely upon the Judgment of this Court in the case of Md. Mofijuddin v. Station of Jharkhand 2009 (3) JCR 654.

9. From the rival submissions, the following admitted facts do emerge:

(i) The Matric Trained pay scale was given to the petitioner with effect from 1981 and later promotion of the petitioner in the I.A. Trained scale was given with effect from 01.04.1982. On both these occasions, admittedly, even if petitioner''s pay scales were wrongly fixed, from a wrong date, the fault was exclusively on the part of the concerned officials of the department. There is no pleading in the statements contained in the counter affidavit of the respondents that such erroneous pay fixation had occasioned on account of any fraud or misrepresentation practiced by the petitioner.

(ii) Neither prior to the petitioner''s date of retirement or after, was any departmental proceeding initiated against him on any charge of alleged misconduct nor was any proceeding under Rule 43(b) of the Jharkhand Pension Rules.

10. Both the above facts would refer to the first question as to whether any recovery of any amount can be made from the retiral benefits of the employee on the ground of excess payment.

11. In an identical case, the Full Bench of this Court in the case of Smt. Normi Topno v. State of Jharkhand 2007 (4) JLJR 466 has held as follows:

After retirement, there is no relationship of employer and employee and as such no recovery can be made from the retiral benefits without following procedure of law as provided under Rule 43(b) of the Bihar Pension Rules. Hence, without fulfilling the conditions under Rule 43(b), recovery of any amount from the retiral benefits of the retired employee, that too without giving him opportunity of being heard, is illegal.

This view was followed by the Full Bench of this Court in the case of Laxman Prasad Gupta Vs. The State of Jharkhand and Others, . In the case of Md. Mofijuddin v. State of Jharkhand (Supra) also while relying upon the ratio decided in the case of Laxman Prasad Gupta(Supra), this Court had held that the recovery of any amount on the ground of excess payment from the retiral benefit of the Government employee cannot be made without recourse to the proviso of Rule 43 of the Jharkhand Pension Rules and the recovery of the amount from the petitioner''s retiral benefit is therefore illegal and cannot be sustained.

12. Thus, while answering the first question, I hold that the recovery of the purported excess paid amount from the retiral benefits of the petitioner is illegal and cannot be allowed. The respondents are therefore liable to refund the amount which has been already been recovered from the petitioner''s retiral dues.

13. Coming to the next question as to whether the pension has to be fixed on the basis of the last pay drawn by him or on the basis of the scale to which the employee was legitimately and legally entitled ?

Sri Manoj Tandon, learned Counsel for the petitioner would argue that the reduction in the pay scale of the petitioner from Rs. 8,000/- to Rs. 6,950/- amounts to demotion/reversion of the petitioner and hence it is deemed to be a punishment in terms of the Rule 8(2)(i) of the Jharkhand Government Primary School Teachers (Transfer and Disciplinary Action) Rules 1994 and since it being a major punishment, it could not have been imposed without conducting a departmental proceeding against the petitioner.

This argument of the learned Counsel, in my opinion, is misconceived in the facts of the present case. The provisions of the Jharkhand Government Primary School Teachers (Transfer and Disciplinary Action) Rules 1994 apply to cases where the relationship of employer employee does subsist. The Rules have no application in cases where after the retirement, the employee has ceased to remain in Government service.

14. The moot question would therefore be as to whether the fixation of the petitioner''s pay scale both in the Matric Trained scale and in the I.A. Trained scale from the date when it was made effective, was correct and to which the petitioner was legally entitled or whether such fixation was erroneously made thereby giving the benefit of such error to the petitioner by way of paying him a

higher amount by way of his salary than what he would have legitimately earned ?

A similar issue came up for consideration before a Division Bench of this Court in the case of Rameshwar Prasad v. Jharkhand State Electricity Board, Ranchi and Ors. 2009 (3) JCR 207 (Jhr), in which the facts were almost similar to the facts of the petitioner''s case. In that case also, the grievance of the writ petitioner Rameshwar Prasad was that at the time of his retirement, he was getting his salary of Rs. 10,120/- per month but his pension was wrongly fixed at a lesser amount of Rs. 9,670/- per month. The Court posed the question as to whether any monetary benefit which was given to the petitioner which he was not entitled to get, could have been rectified subsequently when such mistake was detected ?

While answering the question, the Court had referred to the Judgment of the Supreme Court in the case of Sahib Ram Vs. State of Haryana and Others, and to an earlier Division Bench Judgment of this Court in the case of State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, and has held that if the pay fixation of the employee was wrongly made, the employer had the right to rectify such mistake. Such an error in fixing a higher pay scale than what was legally applicable to the employee, could not clothe the employee with any special right. The Court has further observed that no employee can claim right over a benefit which he got wrongly or by mistake, on the ground of long lapse of time.

14. In the present case also the petitioner''s grievance is that his pay scale which was fixed at Rs. 8,000/- as the last pay drawn, has been reduced. The respondents have countered the petitioner''s objection by explaining that the petitioner''s pay in the Matric Trained scale and I.A. Trained scale was fixed from a date from which he was not legally entitled and on account of the wrong fixation of the pay scale from a retrospective date, the salary of the petitioner which had gradually increased up to Rs. 8,000/-, the same had to be rectified.

16. In the light of the above pleadings, the answer to the second question is as follows:

The respondent authorities have a right to rectify the error, if any, in fixation of the petitioner''s pay scales though before such rectification, the employee has to be given a notice in order to enable him to defend his case.

In the present case, admittedly the petitioner was served with a notice inviting him to explain in the light of the error which was purportedly detected in the matter of fixation of his pay scales from retrospective date. The petitioner did not choose to respond. The respondents have therefore a right to rectify the error and to reassess the pay scales of the petitioner to which he was entitled.

The pension of the petitioner has to be fixed on the basis of the pay to which he was legally entitled and not necessarily on the basis of last pay drawn. If the petitioner was not legally entitled to the salary which he had last drawn before his retirement, he cannot claim the benefit of the higher amount of last paid salary which was erroneously paid to him. The petitioner cannot be allowed to enrich himself unjustly.

17. In the light of the above discussions, I hereby direct the respondents not to recover any amount of purported excess payment from the retiral dues of the petitioner. I further direct the respondents to refund to the petitioner the amount of Rs. 2,93,591/- which has been recovered from the petitioner''s salary and to pay the same to him within one month from the date of this order. The respondents are directed to make final assessment of the last payable salary to which the petitioner was entitled prior to the date of his retirement and after fixing the amount of his pension accordingly, to issue necessary instructions to the office of the Accountant General for issuance of the authority slips which would enable the petitioner to receive his pension. This exercise must be carried out and completed within one month from the date of receipt/production of a copy of this order.

With these observations, this writ application is disposed of.

Let a copy of this order be given to the counsel for the respondent State as also to the counsel for the respondent Accountant General.