(2007) 10 JH CK 0028

In the Jharkhand High Court

Case No : Writ Petition (S) No. 3793 of 2004

Laxman Prasad Gupta APPELLANT

Vs

The State of Jharkhand and Others RESPONDENT

Date of Decision : 11-10-2007

Acts Referred:
Bihar Pension Rules, 1950 — Rule 43

Citation : (2008) 3 JCR 655

Hon'ble Judges : M. Karpaga Vinayagam, C.J;Narendra Nath Tiwari, J;D.K. Sinha, J

Bench : Full Bench

Advocate : Nilesh Kumar, S. Shrivastava, for the Appellant; Sumeet Gadodia, J.C. to A.G., for the Respondent

Final Decision : Allowed

Judgement

M. Karpaga Vinayagam, C.J.—The question requires to be determined in this case by the Full Court is whether the amount, if any, paid in excess to the employee while in service due to mistake, fault or any misrepresentation, can be recovered from the employee after retirement from the Pension or Gratuity of the Government employee.

2. The brief facts of the case could be summarized as follows:

(i) Laxman Prasad Gupta, the petitioner, herein, was appointed as Health Worker on 11.04.1968.

(ii) The first Time Bound Promotion was given to the petitioner in the year 1981. Subsequently he got Second Time Bound Promotion in the year 1993.

(iii) The petitions retired from the service on 30.09.2001. At the time of retirement, his last pay drawn was Rs. 5702/- per month.

(iv) After retirement, pension papers of the petitioner was sent to the Accountant General for the finalization of the pension and other retrial benefits.

(v) The Accountant General returned the pension papers to the authority with an observation that Second Time Bound Promotion was wrongly given to the petitioner as the same should have been given only after 10/25 years since First Time Bound Promotion was given to the petitioner in the year 1981.

(vi) Raising the said objection, the Accountant General recommended for the refixation of the pay scale of the petitioner and for the recovery of excess payment made to the petitioner.

(vii) The State, thereupon simply, accepted the said recommendation and adjusted the excess payment made to the petitioner from his retrial benefits and refixed the pay of the petitioner on tower side than the actually received by the petitioner at the time of retirement.

(viii) Challenging the same, this writ petition has been filed.

3. According to the petitioner, there was no illegality in the Second Time Bound Promotion given to the petitioner; The petitioner, having been appointed in the year 1968, was given First Time Bound Promotion only after 10 years, i.e., in the year 1981 and the Second Time Bound Promotion was given to the petitioner only after 25 years, i.e., in the year 1993; As such the adjustment of the alleged excess amount on the mere objection of Accountant General without giving opportunity to the petitioner to defend his case is illegal.

4. The learned Counsel for the petitioner cited the following decisions:

(i) Sahib Ram Vs. State of Haryana and Others,

(ii) Nakul Raut v. State of Jharkhand 2002 (1) JLJR 597

(iii) Md. Usman Vs. The State of Jharkhand and Others,

(iv) Ram Prasann Singh Vs. State of Jharkhand and Others,

(v) Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr.

(vi) State of Jharkhand v. Baleshwar Singh 2006 (4) JLJR 259

(vii) Nandipati Das v. Bihar State Electricity Board 2006 (4) JLJR 264

(viii) Nand Kishore Pandey v. Jharkhand State Electricity Board 2006 (4) JLJR 558

4. On behalf of the State, it is argued that the adjustment of the excess payment or recovery is perfectly justified on the strength of State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, and Ram Chandra Singh and Others Vs. State of Jharkhand and Others, .

5. We have heard the submissions made by both the counsel and given our anxious consideration.

6. Now, let us refer to the decisions cited by the counsel for the petitioner.

(i) In Sahib Ram Vs. State of Haryana and Others, the Supreme Court observed as follows:

...However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant.... [para 5]

(ii) In Nakul Raut v. State of Jharkhand 2002 (1) JLJR 597 the Single Judge, while dealing with the said question, has given the following answer:

...After retirement and more than three years from the date of promotion, now it is not open to respondents to raise the question of legality and propriety of promotion as was granted in favour of petitioner while he was in service....[para 6]

...the respondents cannot re-open the issue relating to legality and propriety of order of promotion to selection grade as was allowed to petitioner while he was in service at this belated stage, nor can recover any amount, there being no proceeding under Rule 43(b) of the Bihar Pension Rules having initiated. [para 7]

(iii) In Md. Usman Vs. The State of Jharkhand and Others, , the Single Judge of this Court given the following observation:

...After a period of 20 years, he cannot be deprived of all these benefits in absence of any misrepresentation of fraud attributable to him. This case is squarely covered by the judgment of the apex Court in the Sahib Ram''s Case (Supra)...admittedly a great prejudice has been caused to the petitioner by the order impugned, which has otherwise been passed without affording any opportunity of being heard to him....[para 6]

(iv) In Ram Prasann Singh Vs. State of Jharkhand and Others, the Single Judge has given the following observations:

...It is now well-settled that any order causing prejudice to a person cannot be passed without giving him an opportunity of hearing. The impugned orders having been issued violating the principles of natural justice are thus, nul and void. The order of recovery, as contained in Annexure-3, is also in the teeth of the decision of the Supreme Court in State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, and is not sustainable also on that count. Since the instant case is not a case of an inadvertence or mistake in giving promotion, the orders were issued by the competent authorities on the basis of the departmental decision, and the scales were fixed after the respective promotions by the competent authority, and payments of the salary were made on the promoted scales for years till the retirement of the petitioner, the respondents cannot now shift the dates of promotion according to their own volition without giving any notice and opportunity of hearing to the petitioner. It is not a case of admitted mistake/position and as such the decision of the Division Bench in the State of Jharkhand and Ors. v. Smt. Girish Kumari Prasad (supra) has absolutely no application in the facts and circumstances of the instant case....[para 7]

(v) In Bihar State Electricity Board and Anr. v. Bijay Bahadur and Anr. the Supreme Court observed as follows:

...We do record our concurrence with the observations of this Court in Sahib Ram case and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice....[para 10]

...We, however, are not in a position to lend any credence to the same by reason of the fact that while the increments granted have been sought to be recovered but promotions given have not been withdrawn or cancelled....[para 7]

...the amount already paid to the employees could not recovered even if the same were paid by mistake....[para 6]

(vi) The Division Bench of this Court in State of Jharkhand v. Baleshwar Singh 2006 (4) JLJR 259 observed as follows:

...The State can recover the amount by way of filing a suit before a Civil Court of competent jurisdiction or in appropriate case, may file certificate case but in both cases, law of limitation being applicable, it is not open to the State to recover any amount at anytime from pension or gratuity in the name of adjustment, that too without giving opportunity to the retired employee. Before recovery of adjustment of any amount from the pension or gratuity in the case of mistaken calculation or payment in excess, the retired employee should be given an opportunity of hearing to state as to why the amount be not recovered/ adjusted from his pension/gratuity and it will be open to the retired employee to show that such recovery or adjustment is uncalled for or is barred by limitation....[para 13]

...if a person by misrepresentation or duping the State Government draws excess amount of salary or other benefit, such action being misconduct, after retirement it can be recovered only under Rule 43(b) of the Bihar Pension Rules 1950. If charge is not framed while employee is in service, after retirement it is only the State Government, empowered to do so and not any other officer and there is a limitation of four years, prescribed under the Rule....[para 15]

In these type of cases when excess payment is made to a Government employee by mistake and such mistake is committed by some other person, one cannot ignore Rule 43(b) in such cases. It is not that only in the case of misconduct Rule 43(b) can be invoked but it can also be invoked against an employee, if there is a pecuniary loss, caused to the Government due to negligence of the employee. That means the employee due to whose negligence such amount was paid to another employee and such negligence caused pecuniary loss to the State Government, then why the State Government will not recover the amount by invoking the provisions of Rule 43(b) against the person, due to whose negligence pecuniary loss was caused to the State Government....[para 16]

(vii) In Nandipati Das v. Bihar State Electricity Board 2006 (4) JLJR 264 the Division Bench of this Court would give the following observations:

...Under Rule 43(b) of the Bihar Pension Rules, 1950, no amount can be recovered or deducted from the pension, which includes gratuity, without a proceeding and that too can be done, if there is a misconduct on the part of the employee or if there is a loss of the exchequer of the Board, due to misconduct or negligence of the employee. In the present case, neither the procedure, prescribed under Rule 43(b) was followed nor the respondents could lay hands on any documents to suggest that there was a misconduct on the part of the petitioner or there is a loss of exchequer of the Board due to the misconduct or negligence of the petitioner. [para 9]

(viii) The Division Bench of this Court in Nand Kishore Pandey v. Jharkhand State Electricity Board 2006 (4) JLJR 558 would observe as follows:

In our view therefore, the principle laid down by the Supreme Court in Bijay Bahadur''s case (supra) shall apply in the present case. Consequently, it would be totally unfair on the part of the Beard if any increment paid before 1994 is directed to be recovered from the petitioners. [para 11]

7. The guidelines, which could be culled out from these decisions are as follows:

(i) When the excess payment was made not on account of the misrepresentation made by the employee and due to the wrong calculation made by some other employee, the alleged excess amount cannot be recovered from the Pension and Gratuity of the said employee after retirement;

(ii) After retirement and after a long lapse of several years from the date of promotion, it is not open to the department to raise the question of legality and propriety of promotion;

(iii) The issue cannot be reopened with reference to the legality of the promotion given to the employee when he was in service at the belated stage nor the authorities can recover any amount when there is no proceeding under Rule 43(b) of the Bihar Pension Rules having been initiated;

(iv) After a period of more than twenty years from the date of promotion and after retirement, the retired employee cannot be deprived of all these benefits in absence of any misrepresentation or fraud attributable to him;

(v) Action for recovery from Pension and Gratuity, without affording any opportunity of being heard to the employee, would cause great prejudice to the said employee;

(vi) Any order causing prejudice to a person cannot be passed without giving an opportunity of hearing;

(vii) The order passed violating the principles of natural justice is null and void;

(viii) Before recovery or adjustment of any amount from the Pension and Gratuity in the case of mistaken calculation or payment in excess, the retired employee must be given opportunity of hearing to state as to why the amount be not recovered from his Pension or Gratuity and in that event it would be open to the retired employee to show that such recovery or adjustment is uncalled for or barred by limitation;

(ix) White the increments granted on the basis of a wrong promotion are sought to be recovered, the Department ought to conduct an inquiry regarding the validity of promotion and should give findings that the promotion is invalid and is liable to be cancelled.

8. The above guidelines would clearly indicate that though the Government has got powers to recover the excess amount paid by mistake or on wrong promotion, it can recover the same after retirement from his Pension and Gratuity only under the procedures contemplated under Rule 43(b).

9. The counsel for the respondents would mainly rely upon the decisions in State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, and Ram Chandra Singh and Ors. v. State of Jharkhand and Ors. 2005 (2) JLJR 705 decided by the Division Benches of this Court. But, these cases would not be of any help to the respondent, as the question referred here has not been discussed and decided. Those cases would merely refer to the existence of the power of the Government to recover. But they did not decide the question as to what is the purport and purpose of Rule 43(b) and under what procedure can the excess amount be recovered form the retired employee. On the other hand, the decision cited by the learned Counsel for the petitioner, rendered by the Supreme Court and High Court decided the ratio on the basis of Rule 43(b).

10. As indicated above, Rule 43(b) confers the power and prescribes procedure for recovery of the amount from the pension and Gratuity. As per this rule, the State Government has jurisdiction to recover its dues from the Pension and Gratuity of a retired employee only under certain conditions as contemplated u/s 43(b). Let us quote the said provision:

43(a) xx xx xx xx (b) The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement:

Provided that -

(a) such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment;

(i) shall not be instituted save with the sanction of the State Government;

(ii) shall be in respect of an event while took place not more than four years before the institution of such proceedings; and

(iii) shall be conducted by such authority and at such place or places as the State Government may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made;

(b) judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment, shall have been instituted in accordance with Sub-clause (ii) of Clause (a); and

(c) the Bihar Public Service Commission, shall be consulted before final orders are passed.

Explanation. - For the purposes of the rule-

(a) departmental proceeding shall be deemed to have been instituted when the charges framed, against the pensioner are issued to him or, if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted:

(i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to a criminal court; and

(ii) in the case of civil proceedings, on the date on which the complaint is presented or as the case may be, an application in made to a Civil Court.

11. The above provision would provide for compliance of the following conditions before proceeding to recovery of Pension and Gratuity.

(i) The State Government has got a right of withholding or withdrawing the pension and has got the right of recovery from the pension when there is any pecuniary loss caused to the Government. But, before the recovery, pensioner shall be found to have been guilty of a grave misconduct either in a departmental proceeding or judicial proceeding;

(ii) After retirement, the departmental proceeding can be instituted against a pensioner only with the sanction of the Government. Even that institution can be made only in respect of an event which took place within four years from the date of the institution. If judicial proceeding not instituted when the Government servant was in service, the proceeding must be instituted within four years in respect of such event.

12. According to the petitioner, the objection raised by the Accountant General is wholly unjustified and against the admitted records relating to the petitioner;

The petitioner was promoted to the post of Basic Health Worker in the year 1973 with effect from 01.01.1973 and said promotion was subsequently recalled on 29.04.1974 and as such there is no promotion on the post of Basic Health Worker; This fact has not been correctly considered by the Accountant General; Therefore, there is no illegality in the Second Time Bound Promotion; The petitioner was appointed in the year 1968; First time bound promotion was given to him in the year 1981, i.e., after ten years of service; Second Time Bound Promotion was given in the year 1993, i.e., after 25 years of service; Till retirement either in the year 1981 or in the year 1993 the time bound promotions so given were never objected to by the Finance Department.

13. On the basis of the above facts, it is contended by the petitioner''s counsel that before the order of recovery or before adjustment of the amount, if an opportunity had been given to the petitioner, he would have proved through the records that the time bound promotion which was given to him was correct.

14. Admittedly, no amount/excess amount was received by the petitioner on misrepresentation, collusion, fraud or negligence. Admittedly, without giving opportunity to the petitioner to defend his case, a decision has been taken for recovery behind his back mechanically.

15. The Supreme Court in Sahib Ram''s Case has specifically held that unless the excess amount was paid due to any mis-representation made by the employee, the amount paid cannot be recovered from the employee. It is also settled law that any order causing prejudice to a person cannot be passed without giving an opportunity of being heard.

16. As stated above, if opportunity had been given to the employee after retirement, he would have established his defence whereby the State authority would have been convinced that it is not a case for recovery.

17. After retirement, there is no relationship of employer and employee. The recovery out of retiral dues can be made only through the process of law, i.e., under Rule 43(b) of the Bihar Pension Rules.

18. In the instant case neither the State Government nor the competent authority has initiated any proceeding under Rule 43(b) while the petitioner was in service. The proceeding under Rule 43(b) cannot be initiated beyond the prescribed period of limitation.

19. The case of the petitioner is squarely covered by the ratio of Sahib Ram''s case decided by the Supreme Court. Girish Kumari Prasad''s case and other cases relied upon by the respondents would not apply to the present case, as those cases did not decide the issue raised in this case.

20. In view of the above discussion, we come to the following conclusion. To sum up:

In the light of the absence of any material to show that the excess amount was received by the petitioner on misrepresentation, collusion, fraud or negligence, the said excess amount cannot be recovered out of the retiral dues, after retirement, without following the procedure contemplated under Rule 43(b) of the Bihar Pension Rules. In this case the said procedure, which is mandatory, has not been followed. Therefore, the action of the respondents for recovery of the amount from the retiral dues is not valid in law.

21. Therefore, the writ petition is allowed. The reference is answered, accordingly.

Narendra Nath Tiwari, J.

22. I agree.

D.K. Sinha, J.

23. I agree.

