(2011) 08 JH CK 0102

In the Jharkhand High Court

Case No : Writ Petition (S) No. 2701 of 2008

Mahadeo Prasad Sahu APPELLANT

Vs

State of Jharkhand and Others RESPONDENT

Date of Decision : 24-08-2011

Acts Referred:

Bihar Pension Rules, 1950 — Rule 201, 202(1), 43

Citation : (2011) 08 JH CK 0102

Hon'ble Judges : R.R. Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.R. Prasad, J.—The Petitioner having been appointed as Clerk on 20.1.1965 at Leprosy Subsidiary Centre, Chakulia, East Singhbhum was promoted to the post of Non-Medical Assistant at the same centre, vide order as contained in letter No. 2568 (4) dated 12.12.1971. There he was again promoted to the post of Medical Social Worker with effect from 15.2.1980. In due course, the Petitioner was granted A.C.P in the pay scale of Rs. 5500-9000/-with effect from 9.8.1999, monetary benefit of which was given to the Petitioner from 26.3.2004. Thereafter the Petitioner was transferred to the office of District Leprosy Officer, Seraikella on 4.1.2005 and got retired from there on 31.1.2007. Thereupon provisional pension was fixed in the pay scale of Rs. 5500-9000/-. That apart, the amount towards leave encashment was paid taking the pay scale of Rs. 5500-9000/-. The amount payable towards group insurance and G.P.F were also paid but when the amount payable towards gratuity was not paid, the Petitioner made a representation before the Deputy Commissioner, Seraikella and also before the Civil Surgeon, Seraikella putting his grievances of non-payment of the amount of gratuity, annual increment, D.A, medical allowances etc. Upon it, it was communicated by the District Leprosy Officer that the order granting A.C.P to him has been cancelled by the State Leprosy Officer, Respondent No. 2, vide his letter No. 274/SLO/07 dated 5.9.2007 as contained in Annexure 10 which order when was communicated to the Petitioner, the Petitioner came to know that the order granting A.C.P to the Petitioner has been cancelled for the reason that the Petitioner had earlier been given two regular promotions and thereby he was not entitled to have the benefit of A.C.P. Consequently, it was ordered that the amount drawn in excess be deducted and the amount of gratuity be paid in the scale in which he was drawing salary before being granted A.C.P. That order has been sought to be quashed in this writ application. Besides this, it has also been prayed that the Respondents be directed to fix pension on the pay scale of Rs. 5500-9000/-.

2. A counter affidavit has been filed wherein statement has been made that since the Petitioner had already been given two regular promotions, he was not entitled to have the benefit of A.C.P and therefore, when it was detected that he has wrongly been given A.C.P, the order granting A.C.P to the Petitioner was cancelled and that while granting A.C.P to the Petitioner, specific stipulation was there in the order that when it would be detected that A.C.P has wrongly been given, that order would be withdrawn.

3. Learned Counsel appearing for the Petitioner submits that the Petitioner was granted A.C.P by the competent authority, when he found the Petitioner to be entitled to it and that it has never been the case of the Respondents that on misrepresentation being made by the Petitioner or upon fraud being played, the Petitioner was granted A.C.P and, therefore, the authority had No. jurisdiction at all to cancel the order relating to grant of A.C.P to the Petitioner and consequently, the Respondent also does not have any authority to recover the amount said to have been drawn in excess from the pensionary benefit of the Petitioner without taking recourse of the provision as contained in Rule 43(b) of the Bihar Pension Rules.

4.. Learned Counsel submits that the aforesaid proposition has not only been laid down by the Hon''ble Supreme Court but also by this Court in several decisions decided by the Full Bench.

In this regard learned Counsel has referred to decisions rendered in a case of D.V. Kapoor Vs. Union of India and others, , Saheb Ram v. State of Haryana [(1995) 1 SCC 18], Bihar State Electricity Board v. Bijay Bahadur [(2000) 1 SCC 99], Dr. Dudh Nath Pandey v. State of Jharkhand and Anr. 2007 (4) J.C.R 1 (Jhr) (FB), State of Jharkhand and Ors. v. Padmolochan Kalindi and Anr. 2007 (4) J.L.J.R 451, Laxman Prasad Gupta v. State of Jharkhand 2007 (4) J.L.J.R 459 (FB), Smt. Normi Topno v. State of Jharkhand 2007 (4) J.L.J.R 467, Munari Devi v. Bihar State Electricity Board 2008 (1) J.L.J.R 484 (FB), Most. Sumitra Devi v. State of Jharkhand 2008 (1) J.L.J.R 486 (FB).

5. Learned Counsel by referring those decisions submitted that since the authority without resorting to the provision of Rule 43(b) of the Bihar Pension Rules has deducted the amount from the pensionary benefit on the plea of excess drawl, order of adjustment from retiral benefit is quite illegal and hence,

the authority be directed to refund the same and at the same time, the order as contained in Annexure 10 is also fit to be set aside as without there being any misrepresentation on the part of the Petitioner, the Petitioner has been granted benefit of A.C.P.

As against this, learned Counsel appearing for the State submitted that since the Petitioner had already been given two promotions, the Petitioner was not entitled to have benefit of A.C.P. But A.C.P was granted to him mistakenly. When it was detected order granting A.C.P was cancelled and therefore, authority can never be said to have committed any illegality.

6. Mr. Sudarsan Srivastav, learned Counsel who was appointed as Amicus Curiae to assist the Court submitted that in those decisions referred to on behalf of the Petitioner it has been held that where monetary benefit has been given without there being misrepresentation on the part of the person, that benefit cannot be withdrawn/adjusted from the pensionary benefit of the person when he got retired without taking recourse of the provision of Rule 43(b) of the Bihar Pension Rules, but it has never been held in those decisions that the State Government does not have power to annul/cancel the order if it has been passed on mistaken fact.

7. In this regard it was further submitted that if it does happens that the person is paid pension to which he was not entitled to get, sufficient safeguard is there in the Pension Rules to get the excess amount refunded.

8. In this respect learned Counsel has referred to Rule 202(1), 201(1) and also 139(c). Learned Counsel submitted that these rules are there to ensure that one should not be allowed to be enriched without there being any entitlement and possibly keeping in view this principle, this Court in a case of State of Jharkhand v. Girish Kumar Prasad [2004 (2) J.L.J.R 426] held that there cannot be any estopple against State to seek recovery in case of unauthorized payment made to an undeserving person. The said proposition of law was later on followed in a case of Rameshwar Prasad v. J.S.E.B [2005 (2) J.L.J.R 187].

9. By referring to the aforesaid provisions of Bihar Pension Rules and also the decisions rendered by the Full Bench, Mr. Srivastava, learned Counsel fairly submitted that so far recovery of the amount from the pensionary benefit is concerned, that in view of the settled principle cannot be allowed to be recovered without taking recourse of the provision as contained in Rule 43(b) of the Bihar Pension Rules but so far as the matter relating to cancellation of the order granting A.C.P to the Petitioner is concerned, nothing wrong seems to have been done as the Petitioner had earlier been granted two regular promotions and in that event, the Petitioner under the scheme of A.C.P, was not entitled to have and therefore, when he was not entitled to have that, he cannot be allowed to be enriched on that account.

In this respect learned Counsel has referred to a decision in a case of State of Gujarat v. Ratilal Laljibhai Tandol and Anr. 1997 (7) SC 639. Thus, it was submitted that the Petitioner is not entitled to have his pension fixed in the pay scale of Rs. 5500-9000/-.

10. I do find substance in the submission advanced by Mr. Srivastava wherein it has been submitted that in all cases referred to on behalf of the Petitioner, the ratio which has been laid down by this Court is that excess payment, made to a person during course of service without there being any misrepresentation on his part, cannot be allowed to be recovered from the pensionary benefit without taking recourse of the provision under Rule 43(b) of the Bihar Pension Rules.

11. At this stage, it would be better to go somewhat in detail of the fact of those cases in which ratio as aforesaid has been laid down. In this respect, I would first refer to a decision rendered in a case of Dr. Dudh Nath Pandey v. State of Jharkhand and Anr. (supra). In that case on the ground of pendency of a criminal case, 10% pension, full gratuity and full leave encashment were ordered to be withheld till disposal of the criminal case. When the matter came up before this Court, following issues fell for consideration.

1 whether the Government has got power to withhold pension, gratuity and leave encashment on the ground of pendency of judicial or departmental proceeding ?

2 whether the circular or guidelines by the Finance Department including the Circular No. 4564 dated 6.7.1993 conferring power for withholding payment of gratuity and leave encashment on the ground of pendency of judicial or departmental proceeding is legal, valid and has got force of law ?

The Court having taken notice of the provision of the Bihar Pension Rules and also other decisions came to following conclusions:

(i) under Rule 43(a) and 43(b) of the Bihar Pension Rules, there is No. power for the Government to withhold gratuity and pension during the pendency of departmental proceeding or criminal proceeding.

(ii) It does not give any power to withhold leave encashment at

any stage either prior to the proceeding or after conclusion of the proceeding.

In case of Laxman Prasad Gupta v. State of Jharkhand (supra) it had happened so that when Accountant General found that time bound promotion had wrongly been given it made recommendation for refixation and recovery of the amount which order was under challenge.

12. This Court after taking notice of several decisions of this Court and also of Hon''ble Supreme Court as well as decisions rendered in Girish Kumar Prasad v. State of Jharkhand (supra) did hold that though the Government has got power to recover the excess amount paid by mistake or on wrong promotion, it can recover the same after retirement from pension only by resorting to provision under Rule 43(b) of the Bihar Pension Rules.

13. In case of Munari Devi v. Bihar State Electricity Board (supra) when it was

found that the pension, which was fixed on the basis of last pay drawn, was incorrect, recovery was ordered to be made from retiral benefit, the Court again held that it cannot be recovered from legal representative of the deceased.

14. Again in a case of Most. Sumitra Devi v. State of Jharkhand (supra) when it was found that time bound promotion had been given to the Petitioner''s husband without passing examination of the accounts, an order was passed for adjustment of the excess amount from the amount of pension. It was challenged whereupon following question was framed.

Whether the employer could recover excess payment alleged to have been made to the employee after his retirement from the retiral benefit without following the prescribed procedure and without any material to show that excess amount was made to the employee due to his misrepresentation and that too from the legal representative after the death of the employee. The aforesaid question was answered in negative.

15. Yet again in a case of Smt. Normi Topno v. State of Jharkhand (supra) when it was detected that time bound promotion was wrongly given, the amount drawn in excess was ordered to be recovered from the pension and gratuity. That order was challenged but the case was dismissed by the learned Single Judge. However, when the matter came before the Full Bench it having taken into account several decisions came to conclusion which is as follows:

After retirement, there is No. relationship of employer and employee and as such, No. recovery can be made from the retiral benefit without following procedure of law as provided under Rule 43(b) and without cancelling the order of promotion after enquiry by the competent authority, pension and other retiral benefits cannot be recovered that too without giving opportunity to the retired employee and without giving any finding with reference to misrepresentation or misconduct on the part of the concerned employee or any other employee merely on the recommendation of audit objection''.

Once more when the matter relating to recovery of the amount paid on account of increment being given wrongly from the pensionary amount came up before this Court in case of State of Jharkhand and Ors. v. Padmolochan Kalindi and Anr. 2007 (4) J.L.J.R 451 (F.B), the Court reiterated the same view as had been held in other Full Bench matters.

16. In a case of Bihar State Electricity Board v. Bijay Bahadur (supra) when similar matter of recovery of the amount drawn in excess from the retiral benefit came for consideration before the Hon''ble Supreme Court. It was held as under:

We do record our concurrence with the observation of this Court in Sahib Ram case and come to conclusion that since payments have been made without any representation or misrepresentation, the Appellant-Board could not possibly be granted any liberty to detect or recover the excess amount paid by way of increment at the 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 consonance of justice.

17. Thus in all the aforesaid cases decided by the Full Bench in case of Laxman Prasad Gupta v. State of Jharkhand (supra), Smt. Normi Topno v. State of Jharkhand (supra), State of Jharkhand and Ors. v. Padmolochan kalindi and Anr. 2007 (4) J.L.J.R 451 and also by the Division Bench as well as the Single Bench, the Court having taken notice of the provision as contained in Rule 43(b) of the Bihar Pension Rules does find that the Government does have power to recover the excess amount paid by mistake or on wrong promotion but it can recover the same after retirement from his pension and gratuity by invoking the provision of Rule 43(b) of the Bihar Pension Rule. In one of the cases, the State of Jharkhand v. Baleshwar Singh and Anr. 2006 (4) J.L.J.R 259 where excess payment made was sought to be recovered/adjusted from the pension, the Court had taken notice of Rule 139 of the Bihar Pension Rule which does stipulate about the revision of pension in case of service of the pensioner being not satisfactory but in the facts and circumstances, it was observed that the rule is not applicable. However, it was held that the power of recovery is vested with the State Government under Rule 43(b) which is subject to limitation prescribed under the rule. Therefore, it was held that any other authority if not authorized by the State does not have power of recovery or adjustment of the excess amount paid from the amount of pension. But in none of the cases either decided by the Full Bench, Division Bench or the Single Bench, the provisions of Rule 201 and 202(1) of the Bihar Pension Rule have been taken notice of. Rule 201(1) of the Bihar Pension Rule does speak about the admissibility of the pension strictly under the Rules. The said Rule reads as follows:

201. (1) A person which is certified by the Accountant-General to be clearly and strictly admissible under the rules shall be sanctioned

(a) in any case, by he Provincial Government;

(b) in the case of non-gazetted Government servants, by the Government servant who has the authority to fill the appointment vacated by the retiring Government servant.

(2) The sanctioning authority has special responsibility of ensuring that orders sanctioning the pension are sent to the Accountant-General in time enough to enable him to issue the pension payment order not later than the date on which the Government servant is due to retire. Order sanctioning the pension may issue not more than one month in advance of the due date of retirement, and the Accountant-General may issue the pension payment order not more than a fortnight in advance thereof.

Further Rule 202(1) speaks about the recovery of excess amount paid as pension. The said Rule reads as follows:

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 correct.

(2) If after the pension report was made by the Accountant-General any event occurs which necessitates recalculation of the amount of pension, the fact shall be promptly reported to the Accountant General by the head of the department or the head of the office, as the case may be. If No. such event has occurred, the fact shall nevertheless be reported to the Accountant-General within a week from the date on which the Government servant retires.

18. Note appended to the said rule does prescribe that declaration in the form appended as Annexure ''A'' shall be obtained from the retiring Government servant by the authority sanctioning pension. For the purpose of aforesaid rule, the said Annexure A reads as follows:

A N N E XU R E "A"

(To be signed by the retiring Government servant)

Whereas the...........(here state designation of the officer sanctioning the pension/service gratuity/death-cum- retirement gratuity) has consented to grant me the sum of Rs..........per month as the amount of my pension with effect from.... and/or the sum of....... as the amount by gratuity/death-cum-retirement gratuity. I hereby acknowledge that in accepting the said amount(s), I fully understand the pension/gratuity/death-cum-retirement gratuity is subject to revision if the same being found to be in excess of that to which I am entitled under the rules, and I promise to base No. objection to such revision. I further promise to refund amount paid to me in excess of that to which I may be eventually found entitled.

Signature of the Government Servant

1 Signature, Address and occupation of witness

2 Signature, Address and occupation of witness

The declaration should be witnessed by two persons of respectability in the town, village or pargana in which the applicant resides.

19. Thus, what comes out from the conjoint reading of the aforesaid provision as contained in Rule 201(1), 202(1) and the Annexure A is that one is entitled to have amount of pension which is strictly admissible under the rules and if the amount of pension has been paid in excess on account of grant of promotion/ time bound promotion, grant of increment etc. which the Petitioner was not

entitled to it can be recovered/adjusted from the amount of pension in one instalment or more than one instalment. But before making recovery, notice is required to be given to the Petitioner so that he may have his say in the matter relating to recovery of the amount from pension.

20. Thus, apart from the provision as enshrined in Rule 43(b) of the Bihar Pension Rule, the provisions as referred to above is also there under which recovery/adjustment of the excess amount paid towards pension can be made. Those two provisions, according to me, operate in different fields. So far as the provision as contained in Rule 202(1) is concerned, that comes into play when the excess amount of pension is paid either by mistake or on wrong calculation or on other related matter whereas Rule 43(b) does operate in the field where one puts the Government to pecuniary loss on account of misconduct or the negligence and on account of such charge, if one is held guilty either in the judicial or departmental proceeding, the amount to which the Government was put to loss can be recovered from the pension of the pensioner. Therefore, in my view, where the case comes up of excess fixation of pay/pension on account of grant of promotion/time bound promotion, grant of increment etc. to which one was not entitled to have, excess amount would be recovered under the provision of Rule 202(1) of the Bihar Pension Rule. In spite of that State can not be allowed to recover or adjust the excess amount from the amount of pension if it has been paid without there being any misrepresentation on the part of the Petitioner in view of he decision rendered in a case of Bihar State Electricity Board v. Bijay Bahadur (supra) and also in a case of Sahib Ram v. State of Haryana (supra).

21. The case in hand is not the case of any misrepresentation on the part of the Petitioner due to which excess payment was made on account of grant of A.C.P. Therefore, the authority was not entitled to recover the excess amount from the pension. Consequently, the Petitioner is entitled to have money back which has been recovered from the amount of pension.

22. On the other ground also act of recovery of excess amount from pension is not sustainable.

23. In the case in hand the Petitioner, according to State had been given two promotion earlier and in that event, he was not entitled to have benefit of A.C.P, still pension was fixed on the scale which he was not entitled to. Thus, his case comes under the provision of Rule 202(1) of the Bihar Pension Rule but since the provision as contained in Rule 202(1) has not been adhered to before passing order for recovery of the amount from the pension, the order relating to recovery cannot be sustained to be valid as before passing order of recovery No. opportunity as required under that provision itself was given to the Petitioner to have his say in the matter.

24. Under the circumstances, the concerned Respondent is directed to pay back the amount to the Petitioner which has been recovered/deducted from the

amount of pension.

25. Now the question does arise as to whether the Petitioner can be allowed to have pension fixed on the amount drawn in the pay scale of Rs. 5500-9000/-if he is not entitled to get it fixed in the said scale.

26. Admittedly, when the Petitioner was granted A.C.P his pay was fixed in the pay scale of Rs. 5500-9000/-. Accordingly, his pension was fixed. However, when it was detected that the Petitioner has wrongly been given A.C.P as he had already been granted two regular promotions earlier, the sanctioning authority cancelled the order under which the Petitioner had been given A.C.P by virtue of which his salary was fixed in pay scale of Rs. 5500-9000/-, vide its order dated 5.9.2007 (Annexure 10). In that event, the Accountant General in view of the provision as enshrined in Rule 201(1) of the Bihar Pension Rule would never be obliged to fix pension over the salary fixed in the pay scale of Rs. 5500-9000/-.

Rule 201(1) of the Bihar Pension Rule reads as follows:

201. (1) A person which is certified by the Accountant-General to be clearly and strictly admissible under the rules shall be sanctioned

(c) in any case, by he Provincial Government;

(d) in the case of non-gazetted Government servants, by the Government servant who has the authority to fill the appointment vacated by the retiring Government servant.

(2) The sanctioning authority has special responsibility of ensuring that orders sanctioning the pension are sent to the Accountant-General in time enough to enable him to issue the pension payment order not later than the date on which the Government servant is due to retire. Order sanctioning the pension may issue not more than one month in advance of the due date of retirement, and the Accountant-General may issue the pension payment order not more than a fortnight in advance thereof.

27. Thus, it is evident that the Accountant General would certify the pension which is strictly admissible under the rule which would be sanctioned by the sanctioning authority. Since the Petitioner, on account of cancellation of the order granting A.C.P would not be entitled to get salary in the pay scale of Rs. 5500-9000/-. Accountant General cannot be directed to certify the pension payable on the pay scale of Rs. 5500-9000/-. At this stage, I may refer to a case of ICAR and Anr. v. T.K.Suryanarayan and Ors. 1997 (7) SC 635 wherein it has been held that by the Hon''ble Supreme Court that incorrect promotion either given erroneously by the department by misreading rules or pursuant to judicial order contrary to Rules, can not be a ground to claim erroneous promotion. Again in a case of Union of India v. Rakesh Kumar (2001) 4 SCC 301 it has been held that grant of relief contrary to statutory rule is not permissible. Further in a case of Union of India v. S.R. Dingra and Ors. it has been held that correction of clerical mistake in calculating pension which was initially calculated wrong,

revision of pension on account of mistaken calculation is permissible. Mistake does not confer any right and the same can be corrected. This Court has also propounded same view in a case of Rameshwar Prasad v. Jharkhand State Electricity Board and Ors. 2009 (3) J.C.R 207 (jhr.) wherein it has been held that revision of pension on account of mistaken calculation is permissible as mistake does not confer any right and hence, the same can be corrected.

28. Before coming to conclusion it be recorded that in none of the decisions cited on behalf of the Petitioner either decided by the Full Bench or Division Bench the Court has gone into the question as posed above rather in all those cases it has been held that excess amount paid without there being any misrepresentation on the part of the person concerned, the same cannot be allowed to be recovered without taking recourse of the provision of Rule 43(b) of the Bihar Pension Rule.

29. Thus, I am of the considered view that No. employee can claim right over a benefit which he got wrongly or by mistake on the ground of long lapse of time or equity. Accordingly, question posed above is answered in negative.

30. Notwithstanding the conclusion arrived at hereinabove, the impugned order as contained in Annexure 10 cancelling the order granted A.C.P to the Petitioner is not sustainable in law as the same has been passed in violation of the Principle of natural justice. Admittedly, before passing any order as contained in Annexure 10 the authority did not give any opportunity to the Petitioner to have his say in the matter particularly when he was enjoying the benefit of grant of A.C.P since long. Therefore, the order as contained in Annexure 10 is hereby quashed.

31. However, the State Leprosy Officer, Jharkhand, Ranchi (Respondent No. 3) would be at liberty to pass a fresh order in the matter concerning cancellation of the order granting A.C.P to the Petitioner after giving due opportunity to the Petitioner so as to he may have his say in the matter. On taking decision over the matter, he would be doing needful in the matter so that fixation of pension of the Petitioner be made by the Accountant General.

32. With the aforesaid observation, this writ application is allowed.