

(2005) 09 PAT CK 0064
In the Patna High Court
Case No : CWJC No. 1087 of 2001

Mahendra Prasad and Another

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-09-2005

Acts Referred:

Citation : (2006) 1 PLJR 139

Hon'ble Judges : Rekha Kumari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rekha Kumari, J.—The petitioner, Janaki Prasad, has filed this writ petition for quashing the orders, contained in Annexures 3 and 4, and directing the respondents to refund the already recovered amount of Rs. 36,237/- to the petitioner with interest and to fix the pension and other post retirement benefits on the basis of salary drawn on the date of retirement (i.e. at the rate of Rs. 1540/-) and also direct the respondents to pay all the arrears with interest due to wrong fixation of pension. The case of the petitioner is that he was appointed as Tubewell Borer in the Minor Irrigation Department in 1958. During the long tenure of his service he worked to the full satisfaction of his employer and ultimately superannuated on 30.11.1992 from the District Division, Madhubani. He was given First Time Bound Promotion on 1.8.1983 with effect from 1.4.1981 after completion of ten years and his scale was enhanced from Rs. 540/- to Rs. 645/-. In the same year of 1983 he was granted second time bound promotion with effect from 1.4.1981 after completion of 25 years of service and the scale was enhanced to Rs. 725/- per month. As the period of service went on increasing, the petitioner was benefited by the enhanced salary and ultimately on the date of superannuation he was actually receiving his salary at the scale of Rs. 1540/- per month which he had been getting from April, 1990 upto the date of superannuation. After his superannuation on 30.11.1992 the provisional pension of the petitioner was fixed at Rs. 693/- per month from 1.12.1992 which was

continued upto August 1999. Meanwhile, respondent No. 3, the Executive Engineer, vide his letter No. 174 dated 20.3.1998 submitted all the necessary documents relating to pensionary benefits of the petitioner to the office of respondent No. 2, the Accountant General, Bihar. Subsequently, respondent No. 2 by his letter No. 2950 dated 8.9.1999 (Annexure 3) intimated that his pension has been reduced from 693/-per moth to Rs. 663/- per month and fixed his pension at Rs. 663/- per month with effect from 1.12.1992 and pursuant to receipt of the letter of the Accountant General, the Executive Engineer vide his letter No. 18 dated 8.12.2000 (Annexure 4) requested respondent No. 4, the Treasury Officer, to recover the amount of Rs. 36,237/- from the account of the petitioner as the excess payment of salary. He approached respondents No. 3 and 4 through several representations and also sent letters to respondent No. 2 to cancel the order of recovery as the benefit of enhanced salary was given to him not due to mistake, but under the Time Bound Promotional Scheme covered under the 5th Pay Revision Scheme and as such there was no question of excess payment and recovery thereof. But despite all these, in the month of March, 2000, the aforesaid amount of Rs. 36,237/- was deducted from the amount of his provident fund and monthly provisional pension amounting to Rs. 693/-per month paid from December, 1992 to August, 1999 was ordered to be adjusted and it was specifically directed to pay him only Rs. 663/- per month and final pension with effect from 1.12.1992.

2. It appears that during the pendency of this writ petition, the petitioner died and his heirs have been substituted.

3. Respondent No. 3, the Executive Engineer, Minor Irrigation Department, Madhubani, has filed a counter affidavit contending, inter alia, that the State Government had introduced the scheme of time bound promotion vide Finance Department Resolution No. 10770 dated 30.12.1981 in which first time bound promotion was to be sanctioned after completion of ten years of regular service and the second time bound promotion was to be sanctioned after completion of 25 years of service. The petitioner vide order dated 30.12.1981 with the connivance of the then Executive Engineer, contrary to the provisions of the scheme got sanctioned both the time bound promotions from the same date, i.e. 1.4.1981 when the second time bound promotion was due with effect from 1.4.1984 and not only that his pay was fixed at the stage beyond the time scale. He also got it managed by the office that the matter be not placed before the higher authority so that the defect is not detected.

4. On the basis of above two time bound promotions, the provisional pay was fixed but with a condition that in course of confirmation if it is found wrong then the excess payment made would be recovered in lump sum against the further payment including the pension or gratuity. The petitioner had also given an undertaking on 30.12.1983 to that effect. In course of confirmation of time bound promotion it was detected that the fixation was wrong. Hence, the pension and gratuity has been fixed as per corrected time bound promotion and pay

fixation. In course of this it was also found that Rs. 36,278/- had been paid in excess to the petitioner and accordingly, the same has been recovered from his arrear pension/gratuity.

5. The further case of the respondent is that the pay of the petitioner was revised from 1.6.1986 in the revised scale and fixed on the basis of pay advanced on 31.1.1985 which were illegally and wrongfully fixed due to undue time bound promotion and as his pay fixation in the revised scale which was done in March, 1990, could not be verified till the date of his retirement on 30.11.1992 and sent for verification in 1999, the petitioner continued to draw the pay for which he was actually not entitled to. It is also the case of the respondent that the excess payment was deducted not from the G.P.F. but from the pension. The amount of provisional pension has been ordered to be adjusted against the pension fixed and allowed from 1.12.1992.

6. The case of respondent No. 2, the Accountant General, Bihar is that recovery of Rs. 36,257/- has been worked out by the Department and that after regularisation of pay his pension has been fixed at the rate of Rs. 663/- per month on the last pay of Rs. 1325/- and D.C.R. adjusted.

7. Thus, from the pleadings of the parties, it is clear that the petitioner retired on 30.11.1992, the last salary drawn by him was in the scale of Rs. 1350/- and his pension was provisionally fixed at Rs. 663/-per month with effect from 1.12.1992 on the basis of last pay drawn at the scale of Rs. 1350/- and he received the pension at the rate of Rs. 663/- till August, 1999. It is also clear that thereafter his pension was reduced and finally fixed at Rs. 663/- per month on the basis of last pay at Rs. 1325/- instead of Rs. 1540/-. It is also an admitted position that Rs. 36,237/- had been deducted from the petitioner on the ground of excess payment of salary from 1.4.1981 to 30.11.1992 and the order has been made for adjustment of the amount of provisional pension against the pension fixed from 1.12.1992.

8. Learned counsel for the petitioner submitted that in a similar case of the same department a Bench of this Court reported in *Gupteshwar Prasad Vs. The State of Bihar and Others*, had directed the respondents to refund the relevant amount of salary and also directed the respondents to fix the post retirement benefits on the basis of salary actually drawn.

9. Learned counsel for the respondents, on the other hand, submitted that as the petitioner had permanently got the enhanced pay fixed, the above decision could not be applicable and the excess amount paid has been rightly deducted. He also submitted that the final pension has been correctly fixed on the basis of last pay admissible to him.

10. In the case of *Sahib Ram Vs. State of Haryana and Others*, , the upgraded pay scale was given due to wrong construction of relevant order by the authority concerned without any misrepresentation by the employee. The Supreme Court held that the excess payment made to the employee cannot be recovered.

Relying on a decision of the Supreme Court this Court in the cases of Raghbir Prasad Singh vs. Bihar State Electricity Board & Ors., (1996 BBCJ 15), Gupteshwar Prasad Vs. The State of Bihar and Others, and several other cases has held that if the excess payment had been made without there being any misrepresentation on the part of the employee, it is not open to the employer to recover the same.

11. In this case the respondents, of course, have alleged that the petitioner by bringing the. office and then Executive Engineer in collusion, contrary to the provisions of the scheme, got the second time promotion sanctioned with effect from 1.4.1981, but as held in the case of Gupteshwar Prasad (supra) the allegation has also to be proved but there is nothing to show that actually the petitioner had played fraud on the employer. The petitioner was simply a Tubewell Borer. The pay had to be fixed by the Executive Engineer. So, there is no question of any fraud or misrepresentation by the petitioner.

12. Therefore, the respondents were not entitled to recover the amount of Rs. 36,237/- from him.

13. In the case of Gupteshwar Prasad (supra) the case was similar as in this case, this Court in a similar case has held that the petitioner was entitled for fixation of post retirement benefits on the basis of salary on the date of retirement notwithstanding its wrong fixation by the department. Hence, in view of this decision the petitioner is also entitled for fixation of post retirement benefits on the basis of salary which, he, in fact was drawing on the date of retirement and the respondents were not entitled to reduce the pension from Rs. 693/- to Rs. 663/- per months. In the result, this writ application is allowed. The respondents are directed to refund the amount of Rs. 36,237/- to the present petitioners with interest @ 5% per annum. They are further directed to finally fix the pensionary benefits on the basis of salary which the original petitioner was actually drawing and pay to the petitioners the arrears of pension forthwith.