(2023) 02 PAT CK 0062

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 270 Of 2020

Mostt. Punita Karn APPELLANT

Vs

State Of Bihar RESPONDENT

Date of Decision : 22-02-2023

Acts Referred:
Indian Penal Code, 1860 — Section 120B, 406, 409, 420

Citation : (2023) 02 PAT CK 0062

Hon'ble Judges : Anil Kumar Sinha, J

Bench : Single Bench

Advocate : Sanjay Kumar, Raj Shekhar, Arbind Ujjwal, Shailendra Kumar Singh, Ram Kinker Choubey

Final Decision : Allowed

Judgement

1. The husband of the petitioner was working as Assistant Manager, in Bihar State Food and Civil Supplies Corporation Limited (In short, 'BSFC') and died on 14.09.2010 in harness. He rendered his services for about 35 years in different capacities in various districts of Bihar in the BSFC before his death. After the death of her husband, the petitioner filed a representation before the District Manager, BSFC, Sitamarhi, on 05.01.2011 for payment of death -cum- retiral benefits. Instead of paying the death -cum-retiral benefits, the respondent no. 4 lodged First Information Report against the petitioner as well as her son, bearing Dumra Police Station Case No. 19 of 2012, under Sections 406/409/420/120-B of the Indian Penal Code, in which the police, after completion of investigation, submitted final form, exonerating the petitioner and her son of the offence alleged in the First Information Report.

2. The petitioner approached this Court earlier in CWJC No. 3216 of 2016, which was disposed vide order, dated 16.05.2016, with a direction to the respondents that the issues on which there is no controversy should be resolved and settled within a period of eight weeks. A contempt application, bearing MJC No. 4539 of 2018, was also filed by the petitioner for alleged non-compliance of the order,

dated 16.05.2016, passed in CWJC No. 3216 of 2016. After filing of the contempt application by the petitioner, the respondent authority came out with the impugned order, bearing memo no. 11171, dated 31.10.2019, whereby the respondent has accepted the claim of the petitioner towards the death -cum- retiral benefits, but at the same time, ordered for recovery of a sum of Rs. 14,93,28,883.58/- from the petitioner on the ground that the husband of the petitioner had defalcated the food grains of the aforesaid amount while he was working as Assistant Manager, at different places.

3. A counter affidavit has been filed by the BSFC, stating therein that the Managing Director of the BSFC has considered the claim of the petitioner towards death -cum- retiral benefits and found that a sum of Rs. 9,86,883/- is payable to the husband of the petitioner and while he was posted as Assistant Manager, in Sitamarhi, Muzaffarpur and Vaishali, he defalcated Rs. 3,18,765.01/- and also defalcated food grains, while he was posted in Sitamarhi, worth Rs. 4,19,06,511/- and after imposing interest over the defalcated amount and adjusting the amount payable to the petitioner towards death -cum- retiral benefits, the total recoverable amount comes to Rs. 14,93,28,883.58/-.

4. A certificate case, bearing Certificate Case No. 01 of 2012-13 for recovery of the defalcated amount has also been lodged against the petitioner, which has been challenged by the petitioner by way of filing separate writ application, bearing CWJC No. 5673 of. 2016.

5. Learned Counsel for the petitioner, while assailing the impugned order, dated 31.10.2019 (Annexure-11), submits that the impugned order has been passed without initiating any departmental proceeding or any other proceeding for recovery of defalcated amount during the lifetime of the husband of the petitioner. After the death of her husband, a criminal case was lodged against the petitioner for defalcation of the food grains allegedly done by her husband. He further submits that the respondent-authority has not mentioned any provision of law/rules, which authorizes the authorities to recover the death -cum- retiral benefits from the widow. He further submits that the recovery has been ordered against the late husband of the petitioner on the basis of audit objection and this Court, in the case of Md. Alimuddin v. The State of Bihar and Others, reported in 2015 (2) PLJR 184, has held that the audit objection cannot be a proof of offence by itself and it may be a starting point for enquiry and culminating in an order of punishment in a departmental proceeding. The impugned order is, therefore, completely arbitrary, mala fide and unreasonable.

6. In support of his argument, learned Counsel relies upon the judgment, in the case of Md. Nazim v. The State of Bihar and Others (CWJC No. 7754 of 2017), dated 30.08.2019, passed by a co-ordinate Bench of this Court in a case of similarly situated person. He further submits that the aforesaid judgment was challenged by the BSFC in the LPA, which has also been dismissed. He further relies upon the celebrated judgment of the Supreme Court, in the case of State of Punjab and Others v. Rafiq Masih (White Washer) and Others, reported in

(2015) 4 SCC 334 as well as a recent judgment of the Supreme Court, in the case of Thomas Daniel v. State of Kerala (AIR 2022 SC 2153).

7. On the other hand, learned Counsel for the BSFC, referring to the earlier order passed by this Court in the writ application filed by the petitioner, submits that while disposing the writ application, this Court, in its order, dated 16.05.2016, has come to the conclusion that whatever amount is not payable to the petitioner or was recoverable from the husband of the petitioner, the details should be made known within the same time frame stipulated in the order and accordingly, the respondent has passed the impugned order (Annexure-11) for recovery of a sum of Rs. 14,93,28,883.58/- from the husband of the petitioner after adjusting the death -cum- retiral benefits to be paid in favour of the petitioner.

8. I have heard learned Counsel for the parties concerned and have perused the materials available on record.

9. From the factual background of this case, it is clear that no proceeding, departmental and/or any other proceeding for recovery of the defalcated amount from the husband of the petitioner, was ever initiated during the lifetime of the husband of the petitioner. The husband of the petitioner admittedly died on 14.09.2010. For the first time, the respondent authority sought to recover the defalcated amount from the late husband of the petitioner after the petitioner approached this Court, in CWJC No. 3216 of 2016. The First Information Report was also lodged against the petitioner for defalcation allegedly done by her late husband in the year 2012.

10. The Supreme Court, in paragraph 11 of Thomas Daniel (supra), has taken note of a judgment of the Supreme Court, in the case of Col. B. J. Akkara (Retd.) v. Government of India and Others, reported in (2006) 11 SCC 709, and quoted paragraph 28 of Col. B. J. Akkara (supra), which speaks that the relief against the recovery, 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.

11. The Supreme Court, in the case of Rafiq Masih (supra), has held in paragraph 8, as follows:

“8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.”

12. A Division Bench of this Court, in LPA No. 1839 of 2015, refused to interfere with the order passed by the Writ Court in CWJC No. 1581 of 2008, by which the learned Single Judge has restrained the respondent State to effect such recovery from the post retiral benefits of the widow, holding that such recovery could not be made against the widow.

13. The brief facts of the aforesaid case (CWJC No. 1581 of 2008) was that the husband of the writ petitioner was a Junior Engineer, who died in a road accident on 21.07.2004, while on official duty. After the death of husband of the writ petitioner, since the death -cum- retrial dues were not being settled, she filed a writ application, bearing CWJC No. 4690 of 2005 and also contempt application, bearing MJC No. 2365 of 2006. In the contempt application, it emerged that the State authorities had passed an order for recovery of a huge amount against husband of the writ petitioner for advances, which the husband had taken for different work. The Division Bench placed a pointed question to the State to place the necessary provision of law, under which such recovery could be made against the writ petitioner from the retiral dues. No provision was shown by the State in this regard to the Court. Accordingly, the Division Bench upheld the order passed by the Writ Court observing that there are powers, which are granted under the Bihar Pension Rules. One of them has been noted by the Learned Single Judge, which is Rule 43 (b) and the other being Rule 139. Since none of these provisions were invoked against the husband of the writ petitioner, the Learned Single Judge has rightly quashed the order and gave a direction for payment and settlement of the rightful claim, including post retiral dues.

14. Coming to the facts of the present case, it is not contended by the respondent-Corporation that prior to the death of the husband of the petitioner, any departmental proceeding and/or any recovery proceeding was initiated by the Corporation for recovery of the alleged defalcated amount from the late husband of the petitioner. The petitioner is the widow of the deceased employee who died in harness. This Court is of the opinion, based upon the facts of the case, that the effect of recovery from the death -cum- retiral benefits payable to the widow would be unfair, wrongful, improper and unwarranted as the equity

lies in favour of the petitioner and the respondent-BSFC cannot fasten direct liability upon the petitioner, who is a widow, in absence of any rule and/or any legal provision for recovery of the amount from the death -cum- retiral benefits payable to the widow. The petitioner cannot be held responsible for defalcation, if any, done by her late husband during his service period.

15. Having regard to the aforesaid discussion, on law as well as on facts, I am of the considered view that attempt to recover the amount in question, as mentioned in the impugned order, dated 31.10.2019, from the death -cum-retiral benefits, payable to the petitioner, who is a widow, after the death of the employee is unjustified.

16. Accordingly, the impugned order, dated 31.10.2019, is set aside and the respondent no. 3, the Deputy General Manager (Administration), Bihar State Food and Civil Supplies Corporation Limited, is directed to pay the death -cum-retiral benefits to the petitioner within a period of three months from the date of receipt/production of a copy of this order.

17. In the result, this writ application is allowed.

18. There shall be no order as to costs.

