

(2012) 06 JH CK 0031

In the Jharkhand High Court

Case No : Writ Petition (S) No. 5780 of 2009

Raghunath Pandey

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 28-06-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Citation : (2012) 4 JLJR 132

Hon'ble Judges : Dhirubhai Naranbhai Patel, J

Bench : Single Bench

Advocate : Ayush Aditya, for the Appellant;

Final Decision : Allowed

Judgement

D.N. Patel

1. Present writ petition has been preferred for challenging the order passed by the respondent no. 2 at Annexure-1 dated 9th October, 2009, whereby, the salary for the period of July 2009 to September 2009 is ordered to be recovered from the present petitioner. Learned counsel for the petitioner submitted that the petitioner was working as Warder at Central Jail, Hazaribagh. The petitioner was appointed on 31st August, 1973. The service book of the petitioner was in possession of the respondents and they are maintaining the same. For no fault of the petitioner and without any misrepresentation or fraud played by the petitioner, he was continued in the services from July 2009 to September 2009 and, thereafter, the services of the petitioner were brought to an end because he was ordered to be retired. The petitioner has worked up to September 2009 and, therefore, he was also paid salary for the month of July 2009 to September 2009, which has been ordered to be recovered by the respondents at Annexure-1 dated 9th October, 2009. This order has been passed without giving any notice to the petitioner and without giving any opportunity of being heard to the petitioner. Moreover looking to the impugned order at Annexure-1, it appears that there is no allegation upon the petitioner that he has misrepresented the case or he has

played fraud with the Government. The respondents are never giving copy of the service book to the petitioner or employee. The petitioner has worked with full knowledge of the superior hierarchy of the respondents. Accountant etc. are preparing pay bills and it is being sanctioned by other high ranking officers. The salary has been paid to the petitioner for the period already worked by him and, therefore, the salary cannot be ordered to be recovered from the petitioner after his retirement. Moreover, learned counsel for the petitioner has relied upon the decisions reported in 2003 (1) PUR 9 : 2001 (1) JCR 175 : 2001 (2) JCR 185 : 2008 (4) JCR 142 and 2009 (3) JCR 455 and pointed out that once the salary or any amount is paid to the petitioner, who is an employee of the State and if there is no misrepresentation or fraud played by such employee or the petitioner, the amount cannot be recovered at the later stage. In the facts of the present case, impugned order has been passed without giving any notice, otherwise, all these facts and law would have been come to the respondents and, hence, the order at Annexure-1 deserves to be quashed and set aside.

2. Learned counsel for the petitioner also submitted that looking to Rules 288 and 289 of the Jharkhand Service Code, it appears that the service book is prepared, maintained and preserved by the respondents. Even, the respondent-State is not giving copy of the service book to the petitioner. Looking to the provisions under Rule 288 to be read with Rule 289 of the Jharkhand Service Code, it appears that even after retirement, the respondents are not giving original of the service book to the petitioner. The petitioner has to apply for certified copy and that too after retirement only, he can get the same. Thus, there is no mistake lies on the part of the petitioner because every knowledge is vested with the respondents about the date of retirement of the petitioner. In fact, the State should supply copy of the entry made in the service book to its employees at the end of every financial year so that the employee may know if there is any mistake on the pan of the State in the entries made by the respondents because it happens in several cases that there may be erroneous entry in the service book and the State is never showing the service book to its employees for several years together. Once mistake happens, it continues for several years and sometimes up to retirement and when employees are preferring application for correction, then it is not allowed because such application is preferred at the fog end of their career. To avoid this type of situation also, a copy of the service book should be given to the employees at the end of every financial year by payment of some token or actual cost.

3. Learned counsel for the respondents vehemently submitted that the petitioner was appointed on 31st August, 1973. No birth date was given by the petitioner and as per service book, he was aged about 24 years as on such date. Thus, after 60 years of his age, the petitioner was to retire on 30th June, 2009. Instead of retirement, the petitioner has continued in the service up to September 2009 and, therefore, there is order of recovery of salary, which was ahead paid to the petitioner, on or from July 2009 to September 2009. by the impugned order at Annexure-1.

4. Having heard learned counsel for both the sides and looking to the facts and circumstances of the case. 1 hereby quash and set aside the order passed by respondent no. 2 dated 9th October. 2009. which is at Annexure-1 to the memo of the petition for the following facts and reasons:

(i) The petitioner was appointed as Warder at Central Jail, Hazaribagh with effect from 31st August, 1973.

(ii) The service book of the petitioner is preserved and maintained by the respondents. The respondents are never giving any copy of the service book to their employees.

(iii) It also appears that the petitioner has worked for the month of July 2009 to September 2009 with full knowledge of the superior officers. There is no misrepresentation or fraud played by the petitioner for his working for the aforesaid period. Salary etc. has been prepared by the respondents, which is being approved by further high ranking officer. The respondents are maintaining the service book and, therefore, it was the duty of the State to point out to the low ranking employee of the State/petitioner that he has to retire on 30th June, 2009. The State has failed in performing its duty.

(iv) Looking to the impugned order at Annexure-1, it appears that the order of recovery is passed without giving any notice to the petitioner and without giving opportunity of being heard. The salary which has already been paid, is now ordered to be recovered. Such type of order cannot be passed without giving notice to the petitioner. Thus, there is violation of principles of natural justice.

(v) It has been held by the Hon"ble Patna High Court in the case of Most. Kanti Devi and Others Vs. The State of Bihar and Others, in paragraphs 4 and 5, as under:

4. Rightly or wrongly, the petitioner Sridhar Pandey was permitted to work and draw his salary. The period of which he worked he will be entitled to the emoluments. If he was given work as a result of any collusion between the officials it is upto the State Government to take action against the officer concerned, who permitted this extension of service beyond retirement. On record, there is nothing against the petitioner that he may have committed any misrepresentation or fraud so as to extract from the period of retirement.

5. In the circumstances, there is no occasion for the recovery of the amount which was paid to the petitioner for having worked but after the period of retirement. In so far as the pension is concerned, the heirs of Sridhar Pandey will be entitled to any arrears of pension and consequential family pension.

(vi) It has been held by this Court in the case of Balkeshwar v. M/s Central Coalfields Ltd. and another as reported in 2001 (1) JCR 175 in paragraphs 4 and 10 as under:

4. The respondents in their counter affidavit have accepted that the petitioner

retired under V.R. Scheme w.e.f 20th August, 1999. However, plea has been taken that the date of birth was recorded as 26th October, 1941 and the date of appointment was 23rd November, 1958. On the basis of date of appointment, the petitioner having found to have worked for 42 years 11 months and 3 days and as no person can work more than 42 years, the excess payment made has been adjusted from the retrial benefits. 10. In the circumstances, the respondents cannot deduct any amount or adjust from the salary of the petitioner on the ground that he has worked for more than 11 (eleven) months beyond the period of retirement.

(vii) It has been held by this Court in the case of Arvind Kumar Dubey and another v. State of Bihar and others, as reported in 2001 (2) JCR 185 in paragraphs 3 and 4 as under:

3. From the counter-affidavit, it will be evident that late Dubey was holding a post of Paramedical Asstt. in the lower scale of Rs. 160-280/- under the District Board, Hazaribagh. He applied for appointment under the Mines Board and provided appointment vide letter No. 1103 dated 28.9.1972 to the post of Sanitary Inspector, a post with higher scale of Rs. 160-400/- by direct recruitment. In the aforesaid background, the claim as made by the petitioners in the present case that the period rendered by late Dubey in the District Board should be counted, cannot be accepted.

So far as other grievance relating to recovery is concerned, the stand of the respondents is that the Urban Department of the State of Bihar by its letter No. 151 dated 17.3.1992 refused to grant approval for extension of service of late Dubey and was rejected.

It has not been disputed that after the due date of superannuation of late Dubey (31.1.1991), the Board extended his service for another two years till 31.1.1993 and he worked and received salary. During the subsequent period, he was engaged on daily wage and payment was made. There is nothing on the record to suggest that late Dubey continued in the services of Mines Board beyond the period of superannuation on suppression of fact and material. In the aforesaid background, the respondents cannot recover any amount from the death-cum-retrial benefit of late Dubey in the ground that he worked beyond the period of superannuation.

In this context, one may refer the decisions of the Patna High Court in Mubarak Hussain v. State of Bihar 1996 (2) PUR 166 and Dr. Bhagwan Das v. V.C. Magadh University. 1997 (1) PLJR 876, wherein the Court held that if a person continued in service even beyond the period of retirement, the salary so paid for such period cannot be recovered from the post-retrial benefits. 4. The respondents in their counter-affidavit has taken plea that a sum of Rs. 69,648/- was paid to late Dubey during the extension of service which has been ordered to be recovered from the benefits. Further statement made that the amount of wages paid to him as Rs. 35,490.- - was also suggested to recover from such death benefits in view

of audit objection. The respondents are directed not to make any recovery from the death-cum-retrial benefits of late Tapeswar Dubey in respect to the period he continued in service on extension and/or was given appointment on daily wage.

However, the respondents will be entitled to recalculate the pension and other retrial benefits taking into consideration the service rendered by petitioner in the Mines Board, Hazaribagh excluding the period of service as was rendered in the District Board, Hazaribagh. If such calculation has already been made and further amount is found payable in terms with the finding as given above, such admitted dues, if any, be paid to the heirs of late Tapeswar Dubey, on an early date, preferably within two months from the date of receipt/production of a copy of this judgment.

(viii) It has been held by this Court in the case of Janardan Prasad Saha & Anr. v. State of Jharkhand & Ors., as reported in 2008 (4) JCR 142 in paragraphs 2 and 4 as under:

2. Learned counsel for the petitioners submitted that the order for revision of the petitioners' pay was issued by the respondents-Bank and there was no representation/ misrepresentation or fraud played by the petitioners for obtaining the said revised scale. The said amount, which was paid to the petitioners by the Bank towards the arrears of salary on the basis of the revision of the pay scale, cannot be recovered/adjusted from the retrial benefits of the petitioners. There is complete bar for such adjustments. The petitioners are not liable to refund the aid amount, even if subsequently the order of revision of pay was cancelled. Learned counsel placed reliance on a decision of the Supreme Court rendered in Sahib Ram v. The State of Haryana and others, 1994 (5) SLR 753 and a Full Bench decision of this Court in Laxman Prasad Gupta v. The State of Jharkhand and others W.P (S) No. 3793/2004 reported in 2008 (3) JCR 655 (FB) : JLJR 2007 (4) 459.

4. I have heard learned counsel for the parties and considered the facts and materials on record as also the judicial pronouncements. In Sahib Ram case (supra), the Supreme Court has specifically held that any amount paid to an employee without his misrepresentation cannot be recovered. In Laxman Prasad Gupta case (supra), a Full Bench of this Court has held that after retirement, there is no relationship of employer and employee between the parties and the recovery out of the retrial dues cannot be made, except by following the due procedure established by law. No contrary rule or decision has been produced on behalf of the respondents.

(ix) It has been held by this Court in the case of Ramchandra Singh v. State of Jharkhand & Ors., as reported in 2009 (3) JCR 455 in paragraphs 7 and 8 as under:

7. The aforesaid letter has been issued on 4.6.2007 i.e. after five years of retirement of the petitioner and the law in this regard is well settled. The Full

Bench of this Hon''ble Court in 2007 (4) JLJR 459 (Laxman Prasad Gupta vs. The State of Jharkhand & Ors.) at paragraph 20 held as under:-

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 mis-representation, collusion, fraud or negligence, the said excess amount cannot be recovered out of the retrial dues, after retirement, without fallowing 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 retrial dues is not valid in law.

8. Considering the aforesaid facts and circumstance of the case the respondents are directed not to recover any amount in excess already paid and if already recovered the same shall be refunded to the petitioner. The respondents are further directed to compute the arrears based on the revised pay scale as admitted in their own counter-affidavit and also revise the pension accordingly.

(x) Moreover, it has been held by the Hon''ble Supreme Court in the case of Sahib Ram Vs. State of Haryana and Others, , especially in paragraph 5, which reads as under:

5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. 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.....

(Emphasis supplied)

(xi) It has been held by the Hon''ble Supreme Court in case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, , especially in paragraph no. 11, which reads as under:

11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due, to the fault of the

respondents, the petitioners being in no way responsible for the same.

(Emphasis supplied)

(xii) It has been held by the Hon'ble Supreme Court in case of V. Gangaram Vs. Regional Joint Director and others, . especially in paragraph 7. which reads as under:

7. On the basis thereof, the appellant entitled to only two additional increments, namely, one increment for MA and thereafter one for M.Ed. Under these circumstances, the authorities have wrongly applied the GOMs No. 928 and GOMs No. 266 Finance and Planning dated 17111986. While issuing the notice, it was confined to the question of recovery of the arrears paid to him from the year 1985, the year in which he is eligible to acquire additional qualifications for holding the post of lecturer. Thus, it could be seen that he is entitled to the revised scale of pay giving the additional increments on two qualifications, namely, MA and M. Ed., and, therefore, he is entitled to the computation of the scale of pay then applicable to him prior to the date of immediate month in which examination was conducted of the scale of pay plus two additional increments. He is not entitled to the four increments, as successively claimed. We hold that he is entitled to only two increments, as indicated above. Since the Department itself has adopted the above approach, we direct that arrears paid prior to 1985 are not to be recovered and excess amount from 1985 is liable to be recovered from the pension payable to the appellant. The installment should be proportionately distributed so as not to cause any undue hardship.

(Emphasis supplied)

In light of the aforesaid decisions also, there is no misrepresentation by the present petitioner and, therefore, amount which has been paid towards the salary or towards work already done by the petitioner cannot be ordered to be recovered.

(xiii) It has been held by the Hon'ble Supreme Court in the case of Dev Dutt Vs. Union of India (UOI) and Others, in paragraphs 35 and 36 as under:

35. Thus natural justice has an expanding content and is not stagnant. It is therefore open to the Court to develop new principles of natural justice in appropriate cases.

36. In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its upgradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by

Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

(Emphasis supplied)

(xiv) It has been held by the Hon'ble Punjab & Haryana High Court in Civil Writ Petition No. 13281 of 2004 vide judgment dated 16, March. 2007 in paragraphs 1 and 4 as under:

1 By our order dated 11.9.2006. we directed the respondents to reconstruct the service book of the petitioner and to produce the same in this Court. In compliance of our aforesaid directions.

Mr. Ashok Aggarwal, additional AG Punjab has handed over to us in Court, the re-constructed service book of the petitioner. He, however, states that the petitioner remained under suspension from 14.6.1986 to 27.7.1986 and since the details of the aforesaid period are not available with the respondents, the same could not be dealt with in the service book. We are satisfied that the service book of the petitioner has been re-constructed in compliance with our direction.

4. The respondents are directed to furnish a copy of the service book to the petitioner on payment. It will be open to the petitioner to claim further increments if he finds the same as having not been paid to him after examining the service book.....

(xv) Rules 288 and 289 of the Jharkhand Service Code, 2001 read as under:

288. A service book in such form as the Comptroller and Auditor General may prescribe, must be maintained for every Non-gazetted Government servant holding a substantive post on a permanent establishment, with the following exceptions:

(a) Government servants, the particulars of whose service are recorded in history of service, or a service register maintained by the Accountant General

(b) Sub-Registrars, whose record of service is maintained by the Inspector General of Registration in the form of service register.

(c) Head warders and warders of the jail department.

(d) Inferior servants of all sorts.

Note I.- When a service book is opened for a Government servant on his substantive appointment to a permanent post any previous continuous officiating or temporary service rendered by him should be recorded in it.

Note 2.- Service book may also be maintained for temporary Government servants in superior service serving for more than a year.

289. In all cases in which a service book is necessary under Rule 288, such a book [shall be maintained] for a Government servant [from the date] of his first

appointment to Government Service. It must be kept in the custody of the head of the office in which he is serving and transferred with him from office to office.

Note 1.- The service book shall not be returned to Government servant on retirement, resignation, or discharge from service even in cases where he might have paid for it already.

Note. 2- A Government servant may, however, on quitting serving, obtain a certified copy of his Service Book on payment of a copying fees of Rs. 5 only

(xvi) In view of the aforesaid provisions, the respondent-State was within full knowledge of the date of retirement of the present petitioner because it is a State, which is maintaining and preserving the service book. They are never giving copies of the service book to their employees. Had a copy of the service book been given to the petitioner, it would have been known to the petitioner about the correct date of his retirement. This document namely, service book is not a document covered by the Official Secrets Act and, therefore, at the end of every financial year (because additional entries are made at the end of every financial year) at least employees must be offered the certified copy of the said service book after taking token cost or actual cost from the concerned employee. This Court has come across several cases, in which, there are disputes about the date of birth, entered into the service books, and as stated hereinabove, the State is never giving any copy of the service book to its employees and, therefore, always dispute is being raised at the fag end of the service. Therefore, I see prima facie reasons for directing the respondents to supply the certified copy of the service book to its employees after taking token cost or actual cost from them. This will maintain the transparency-There are several advantages of grant of such type of certified service book to the employee at the end of every financial year:

(a) If there is any error in the initial entries, in service book, it can be pointed out by the concerned employee to the State, immediately;

(b) If there is any error in additional entry incorporated within one year, then also immediately in the next year it can be pointed out by the employee;

(c) By grant of such type of certified copy of the service book to the employees, no dispute can be raised at the fag end of the service about the entries;

(d) Sometimes, the Government is unable to trace out the original service book and, therefore, employees are not getting retirement benefits, in time. In such cases, they have to wait for years together. Due to loss of service book, sometimes their family members are even not getting family pension, upon death of the employee. This creates lot of hardship to the retired employees or to their legal heirs in getting pension or family pension. If such type of certified copies of service book is given at the end of every financial year, easily, the employee or their relatives can be called upon to supply such certified copies for reconstitution of service book, in the case the original service book is not

traceable. This methodology will be useful for early payment of pension or family pension or for payment of oilier retirement benefit.

(e) This Court has come across several cases, in which, there are disputes about the nominee and legal heirs etc. Sometimes, names of children of employees are not being properly inserted in the service book and then the dispute arises for compassionate appointment etc. This type of difficulty can also be avoided by grant of certified copies of service book to every employee at his own cost. Service book is not a secret document. Nothing is to be hidden by the Government from its own employee. Such type of grant of certified copies of service book is not only beneficial to the Government, but, will also be beneficial to the employee but to the whole system of the Government. Other departments (i.e. other than department of employee) can also easily assess, the grant of benefits like Assured Career Progression, Pension calculation, Gratuity calculation and Earned Leave Encashment. It will also facilitate to the Justice Delivery System, in case any dispute has arisen. There is no statutory bar for grant of certified copies of the service book to the employees. No Act, Rule or Regulation prohibits the Government or authorities, which are "State" within the meaning of Article 12 of the Constitution of India for grant of copy of service book to their employees, who are the stake holders.

(xvii) I therefore direct the State of Jharkhand to offer its employees for grant of certified copies of service book at the end of every English calendar year i.e. in the month of April at the cost of employee. The certified copies of the service book will be given so that the aforesaid benefits can be enjoyed by the employee of the State.

(xviii) I hereby direct the Chief Secretary of the State to direct the departmental heads to offer certified copies of the service book, which is necessary to be maintained under Rules 288 and 289 of the Jharkhand Service Code, at the end of every financial year i.e. in the month of April. In this regard, necessary circular shall be issued by the Chief Secretary to all his Secretaries so that it may be further percolated to the vertical hierarchy and let there be proper publication of this circular amongst the employees. I further direct the Chief Secretary of the State to put his circular, which has been issued in term of this order, at the notice board of the Government offices so that employees may know about their right to get certified of the employees of the state a copy of circular, issued by the Chief Secretary, shall also be sent to them by the office of the Chief Secretary of the State so that all the employees of the Government may know about their right to get the certified copies of the service book.

5. As a cumulative effect of the aforesaid facts, reasons and judicial pronouncements, I hereby quash and set aside the order passed by respondent no. 2 dated 9th October, 2009, which is at Annexure-1 to the memo of the petition. The amount which is already recovered from the petitioner is, hereby, order to be returned to the petitioner within a period of four weeks from the date of receipt of a copy of the order of this Court.

6. Accordingly, this writ petition is allowed and disposed of. Registry is directed to send a copy of this order to the Chief Secretary State of Jharkhand, Ranchi initially by FAX and, thereafter, by registered post with A/D.