(1994) 09 PAT CK 0006

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5744 of 1993

Ram Bahadur Sinha APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 13-09-1994

Acts Referred:

Citation : (1994) 09 PAT CK 0006

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This writ petition has been filed challenging the validity of the order dated 4th May 1993 by which the amount of pension and

gratuity of the Petitioner has been reduced by 100% under Rule 139 of the Bihar Pension Rules (in short, ''the Pension Rules'' or ''the Bihar Rules'')

and the order dated 11th May, 1993 by which a proceeding under Rule 55 of the Civil Services (Classification, Control & Appeal) Rules, 1930

has been initiated against him. During the pendency of the case of corrigendum order was issued on 29th June, 1993 to the effect that the aforesaid

proceeding will be deemed to be under Rule 43(b) of the Pension Rules. During course of hearing of the case, Counsel for the State stated that the

order dated 4th May 1993 will be withdrawn. Thus, the validity of the proceeding under Rule 43(b) of the Pension Rules alone survives for

consideration.

2. The Petitioner retired as Chief Engineer in the Water Resources Department of the State Government on 30th November 1991. He was served

with a notice dated 21st May 1992 to show cause as to why recovery of the amount of loss to the tune of Rs. 24 lakhs which the State

Government has suffered on account of the purchases made by the Petitioner during the tenure of his service be not made from his pension and

gratuity. The Petitioner filed his show cause denying the allegations. The State Government, however, came out with the aforementioned orders

dated 4th May, 1993 and 11th May 1993. It is not necessary to set out the facts relating to the charges or the explanation thereto.

3. Mr. S.J. Mukhopadhyaya, learned Counsel for the Petitioner, did not dispute the power of the State Government to withhold pension under

Rule 43(b) of the Pension Rules. According to him, however, such withholdment cannot exceed 10% of the amount of pension. According to him

further, so far as the gratuity is concerned, the same cannot be withheld at all. In support of the latter plea, he placed reliance on D.V. Kapoor Vs.

Union of India and others, and F.R. Jesuratnam v. Union of India, 1990 (Supp) SCC 640. Faced, however, with the latter decision of the

Supreme Court in Jarnail Singh Vs. The Secretary, Ministry of Home Affairs and others, which has held that the expression ''pension'' in Rule 9 of

the Central Civil Services (Pension) Rules, 1972 (in short, ''the Central Rules'') includes gratuity and to that extent has over ruled the contrary view

taken in the aforesaid two decisions. Mr. Mukhopadhyaya submitted that the decision has been rendered in the context of the Central Rules and

cannot be taken to be an authority on the point in the context of the Bihar Pension Rules, Counsel submitted that the decision in Jarnail Singh

(supra) was rendered on a finding that the term ''pension'' in the context of the Central Rules is not used in contradistinction to gratuity. Counsel

contended that in the Bihar Rules, ''pension'' and ''gratuity'' have been assigned opposite meanings and, therefore, pension cannot be said to include

gratuity.

4. I shall first take up the question as to whether the State Government is competent to withhold 100% pension of a retired Government servant.

Power of withholding pension is contained in Rule 43(b) of the Pension Rules. The said Rule reads as follows:

43(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 a 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 or 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 which 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 place, 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 is made to a civil Court.

5. From bare perusal of the above rule it is clear that the State Government is empowered to withhold or withdraw the whole or part of amount of

the pension, permanently or for specified period if the pensioner is found guilty of grave misconduct in any departmental or judicial proceeding

during the tenure of his service including the service rendered on re-employment. Likewise, the State Government is also competent to make

recovery of the amount of pecuniary loss--whole or part of it--from pension if the pensioner is found to have caused pecuniary loss to the

Government by misconduct or negligence during tenure of his service including service rendered on re-employment. According to counsel for the

Petitioner, however, any part of pension can be withheld or withdrawn or recovery made only after the Petitioner has been found guilt of grave

misconduct or having caused pecuniary loss to the Government by misconduct or negligence in a departmental or judicial proceeding. Counsel in

this connection referred to the proviso and explanation appended to the Rule and submitted that having regard to the fact that the Rule envisages

certain restrictions and limitations upon the power of the State Government in the matter of initiation of either departmental or judicial proceeding, it

cannot be said that the power of withholding or withdrawing pension or recovery thereof is unfettered and absolute.

6. There can be no dispute that departmental or judicial proceeding for the purpose of exercise of power under Rule 43(b) can be initiated within

the parameters of the restrictive provisions as contained in the Proviso and the Explanation to the Rule. There cannot be any dispute either that

withholdment or withdrawal of the amount of pension or its recovery as a measure of punishment can be made only after the person concerned has

actually been found guilty of grave misconduct or to have caused pecuniary loss to the Government by misconduct or negligence during the tenure

of his service. The question for consideration, however, is whether the State Government is not competent to withhold whole or part of the amount

of pension as an interim measure, where the departmental or judicial proceeding has already been instituted or where a decision to institute the

same has already been taken. The answer, in my opinion, has to be in the affirmative, withholding whole or part of the pension pending

departmental or judicial proceeding would be just like placing a Government employee under suspension pending departmental proceeding or

criminal case against him. It is well known that any such order of suspension as an interim measure in contradistinction to ''suspension'' as a penalty

under Rule 49 of the Civil Services (Classification Control & Appeal) Rules, 1930 or Rule 2 of the Bihar and Orissa Subordinate Services

(Discipline and Appeal) Rules, 1935, is not penal in nature. Just as an order or suspension pending departmental proceeding or criminal case does

not visit the person concerned with any evil consequences inasmuch as in the event of his being found not guilty of the charge he becomes entitled to all the service benefits including pay and allowances etc. for the intervening period, similarly, any order exonerating the person concerned of the

charges in the departmental or judicial proceeding within the meaning of Rule 43(b) would entitle him to full pension. Therefore, withholding whole

or part of pension as an interim measure during the pendency of the proceeding or in contemplation thereof cannot be said to be penal in the eye of

law. The contention that pension cannot be withheld without recording a finding in respect of misconduct or negligence in a departmental or judicial

proceeding, thus, cannot be accepted.

7. Learned Counsel for the Petitioner drew our attention to circulars of the State Government which provide for payment of provisional pension at

the rate of 90% pending departmental proceeding and submitted that in terms of the said circulars the State Government is bound to pay 90%

pension to the Petitioner notwithstanding initiation of the impugned proceeding under Rule 43(b). I do not find any substance in this contention

either. Firstly, there is no conflict between the provisions of Rule 43(b) and the circulars referred to by the counsel, and secondly, even if such

conflict were there, the circulars to the extent of conflict cannot prevail over the Rules which are statutory in character. It is well settled that

circulars or executive orders of the Government cannot override statutory provisions contained in any Act or the Rules. I have already indicated

above that Rule 43(b) contemplates withholding of whole or part of the pension as an interim measure. The circulars referred to by the learned

Counsel also contemplate withholding of 10% pension as an interim measure. This is generally and ordinarily to be done. However, that does not,

mean that in each and every case, irrespective the nature of the allegations and the attending facts, 90% pension should be released as a matter of

course or right. The circulars merely ''provide'' for payment of provisional pension. They do not entitle the persons concerned to receive

provisional pension as of right. At best, it cannot be said that in terms of the circulars, they are entitled to consideration as to whether they should

be allowed provisional pension at the rate of 90% or not. But the circular cannot be interpretated to confer any right upon the person to receive the

provisional pension as a matter of course. Any such interpretation would be in derogation of the provision of Rule 43(b) which expressly provides for withholding of ""a pension or any part of it"", meaning thereby the whole or part of the amount of pension. I am, therefore, unable to accept the

contention of the learned Counsel that withholdment cannot exceed 10% in all cases. I, accordingly, hold that while ordinarily and generally the

State Government should pay the provisional pension at the rate mentioned in the circulars pending departmental or judicial proceeding, in

appropriate cases, it is open to it to release a lesser provisional pension or nothing at all i.e. withhold whole of it.

8. While upholding power of the State Government to withhold whole or part of pension as an interim measure, the need of a retired Government

servant to get his due in time cannot be undermined. The income of a Government employee upon his retirement comes to zero. A Government

employee facing departmental or criminal proceeding or suspension during the tenure of his service is entitled to certain allowances but he may not

get anything during the entire course of departmental or judicial proceeding under Rule 43(b) after his retirement. This may make his survival

difficult. Therefore, while conceding the power to the State Government to withhold whole of the amount of pension, I must observe that the said

power should be resorted to only in rarest of the rare cases. Ordinarily and generally where the allegations are not serious, only 10% pension

should be withheld as provided in the government circulars on the point. In more serious cases, of course, the Government may consider

withholding more amount. Needless to say that while taking decision in the matter of release of provisional pension or withholding part of it, the

Government is expected to consider the matter objectively and judiciously.

9. Another way of protecting the interest of the retired Government servant is to fix time limit for the conclusion of the impugned proceeding. No

hard and fast rule pan be laid down as to the time limit within which the proceeding must be disposed of. It would depend on facts of each case,

the attending circumstances, the nature of the charges, volume of the evidence as may have to be produced, the conduct of the parties and so on.

However, it is always open to the person concerned to approach the Court for appropriate direction for time bound conclusion of the proceeding,

should the same be unnecessarily and unreasonably delayed or protracted.

10. Now I shall take up second point, namely, whether gratuity too can be

withheld either as a measure of punishment upon adverse finding in a

departmental or judicial proceeding within the meaning of Rule 43(b) or as an interim measure pending such proceeding. Rule 43(b), no doubt,

does not in terms refer to ''gratuity''. That, in my opinion, is not be-all and end-all matter. As would appear from the definition clause under Rule 27

of the Pension Rules, pension includes gratuity. The same definition has been given to the term in the Bihar Service Code under Rule 35. In Jarnail

Singh v. The Secretary, Ministry of Home Affairs (supra) their Lordships had occasion to consider the same question in the context of Rule 9 of

the Central Pension Rules, the material part of which reads as under:

9. Right of President to withhold or withdraw pension.--(1) The President reserves to himself the right of withholding or withdrawing a pension or

part thereof, whether permanently or for a specified period, and of ordering recovery from a pension of the whole or part of any pecuniary loss

caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during

the period of his service, including service rendered upon reemployment after retirement.

xxxx

The definition of the term ''pension'' in the Central Rules is as follows:

Pension includes gratuity except when the term pension is used in contradistinction to gratuity.

11. It would appear that while Rule 9 of the Central Rules in couched in exactly the same language as Rule 43(b) of the Bihar Rules, the definition

of the term ''pension'' in the two Rules is also the same with the only difference that in the Central Rules what is implicit has been made explicit by

providing that except where the two terms ''pension'' and ''gratuity'' are used in different sense, pension would not include gratuity. In other words,

ordinarily the term ''pension'' wherever it occurs in the Rules would also include gratuity, but where they have been used in opposite sense or have

been assigned opposite meanings pension would not include gratuity. Their Lordships upon consideration of the said two Rules held that the

amount of gratuity can also be withheld by the President under Rule 9. It may be stated here that in that case the entire amount of pension and

gratuity had been withheld on permanent basis by way of punishment and the only question for consideration was whether the payment of gratuity

also could be withheld by way of punishment for recovery of loss sustained by the Government. The point, thus, in my opinion, is fully covered by

the above decision of the Apex Court.

12. Learned Counsel for the Petitioner, however, submitted that the terms ''pension'' and ''gratuity'' have not been used in the same sense in the

Bihar Rules and, therefore, being in contradistinction to each other, pension does not include gratuity and, thus, the power under Rule 43(b) cannot

be extended to withholding of gratuity as well. Counsel referred to the various provisions of Rules 46(b), 54 and 87 which make specific reference

to gratuity and other allowances. There is nothing in the said Rules to suggest that the term ''gratuity'' has been used in contradistinction to pension.

They envisage different situations. There is nothing therein to suggest that the amount of gratuity cannot be withheld under Rule 43(b).

13. Counsel for the Petitioner also referred to certain circulars of the State Government which provide for payment of the entire amount of gratuity.

It was submitted that in view of the said circular the Government is not competent to withhold any portion of the gratuity under any circumstance. I

have already stated above that the executive order and circulars of the Government have to be read in harmony with the provisions of the statute

and not so as to override the same. In the case of Dinnath Prasad v. The State of Bih 1986 PLJR 405, relied upon by learned Counsel for the

State, their Lordships dealing with the same plea observed as follows:

So far, the circular of 31st July 1980 mandating the release of the entire gratuity within six months of the date of retirement, which cannot be

withheld under any circumstances, must be read in the light of the Bihar Pension Rules. There is no period of limitation to conclude a particular type

of departmental proceeding provided under the Bihar Pension Rules. The Circular has to be subservient to the statutory rules and cannot have an

independent role de hors the statutory rules.

I find myself in complete agreement with the above observations.

14. I am aware of decisions of the Courts including the Supreme Court that gratuity is not a bounty which is paid gratuitously and if an employee

has earned if for his long and meritorious service. It should not be denied to him even though at the end of the service he is found guilty of serious

Misconduct. See, for example, The Garment Cleaning Works Vs. Its Workmen, . However, it may be noted that those decisions have been

rendered in the context of industrial workers while considering disputes regarding gratuity scheme, etc. for them. The ratio of those decisions has

no application to Government servants who are governed by the respective Rules. In fairness to learned Counsel for the Petitioner I must say that

he did not take that line of argument.

15. I would, accordingly, hold that it is open to the competent authority of the State Government to withhold whole or part of the amount of

gratuity to appropriate cases under Rule 43(b) of the Bihar Rules. I would, however, hasten to reiterate that the power of initiating proceeding and

withholding whole or part of gratuity or pension during the pendency of the proceeding should be done with care and caution Pension and gratuity

are properties of a Government servant, the right to receive which should not be taken away in a casual manner. As held in Deokinandan Prasad

Vs. State of Bihar and Others, a Government servant in the fall of his life should not be exposed to unnecessary deprivation and should be spared

of a costly litigation to claim what is justly due to them.

16. I would, accordingly, direct the Respondents to conclude the proceeding initiated against the Petitioner by resolution dated 11th May 1993

read with resolution dated 29th June, 1993 within four months from the date of filing of the show cause by the Petitioner subject, of course, to his

cooperation with the authority concerned. If the show cause has already been filed by him, the period shall run from the date of production of a

copy of this order.

17. In the result, the writ application is dismissed but subject to the observations and directions as mentioned above.

Narayan Roy, J.

18. I agree.

