(1999) 09 PAT CK 0016

In the Patna High Court

Case No : C.W.J.C. No. 8641 of 1998

Rebati Raman Kanth APPELLANT

Vs

Chairman, Bihar State Electricity Board and Others RESPONDENT

Date of Decision : 02-09-1999

Acts Referred:
Penal Code, 1860 (IPC) — Section 120(B), 201, 409, 420, 465

Citation : (2000) 1 PLJR 192

Hon'ble Judges : Radha Mohan Prasad, J

Bench : Single Bench

Advocate : Binod Kumar Kanth and Kamla Lal Srivastava, for the Appellant; M.K. Jha and Mohit Kumar Shah for the B.S.E.B., for the Respondent

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ petition, grievance of the petitioner is that though he retired from service of the Respondent-Bihar State Electricity Board while posted as Chief Engineer on 31.10.1996 and thereafter filed representation in terms of the general directions for relase of his pension in August, 1998, he was only paid 90% of pension and G.P.F. amount. According to the petitioner, he has been illegally and arbitrarily kept deprived of 10% of his pension, full gratuity and the amount of leave encashment. As such, prayer has been made to direct the Respondent-Board to sanction and pay the said remaining retirement benefits with interest. It is not in dispute that the petitioner superannuated from service on 31.10.1996 and in August, 1998 he filed representation in terms of the general directions of this Court for release of his entire pensionary benefits, yet the aforementioned 10% of his pension, full gratuity and leave encashment have not been paid. In the counter affidavit filed on behalf of the Respondent-Board, it has been stated that while the petitioner was in service of the Board, he was made an accused in Vigilance P.S. Case No. 5 of 1989 regarding theft of electricity by M/s Usha Alloy & Steel Limited, Gamharia, Jamshedpur (a H.T. Consumer). According to the case of the Respondents the charges relate to the period of posting of the petitioner as Electrical Executive Engineer, Electric Supply Division, Jamshedpur. The Board having been satisfied with the report of I.O. and documents pertaining thereto about the existence of criminal misconduct accorded sanction to launch prosecution against the petitioner vide office order no. 3505 dated 19.7.1996 (Annexure-A). It is, thus submitted that due to pendency of the criminal case and sanction of the prosecution against the petitioner, provisional pension at the rate of 90% has been sanctioned to him. According to the stand taken in the counter affidavit 10% of pension, gratuity and other benefits have been kept pending till final judgment in Criminal Case in terms of the provisions contained in Rule 43 (b) of the Bihar Pension Rules read with Board''s Standing Order No. 784 dated 21.8.1997, a photostat copy whereof has been annexed as Annexure-B. It is stated that F.I.R. was lodged on 16.6.1989 for misuse of Government office in collusion with the aforementioned consumer to facilitate theft of energy, preparing fabricated documents to benefit the consumer and thereby causing loss to Board''s revenue for self interest during the period April, 1986 to December, 1988. It is further alleged that the petitioner is an accused in the said first information report.

2. In the supplementary affidavit filed on behalf of the petitioner, a copy whereof has been served on the counsel for the Board on 10.8.1999, it is stated that the Board filed F.I.R. on 16.6.1989 in which the petitioner was not made accused. The names of F.I.R. accused were Anandi Rai, Bijay Bhushan, Subodh Narayan and Braj Kishore Jhawar (wrongly typed as Braj Kishore Thakur). The petitioner was posted as Electrical Executive Engineer, Electric Supply Division, Jamshedpur from 25.8.1981 to 9.8.1985 and the event in the case relates to the period between August, 1984 to 4.3.1985 as it is evident from the F.I.R. Thus, according to the petitioner, the events relate to the time which is more than four years before the F.I.R. was lodged.

3. Despite service of the said supplementary affidavit on the learned counsel appearing for the Respondent-Board on 10.8.1999, no further affidavit in reply to the same has been filed on behalf of the Board. As learned counsel for the Board strongly asserted that the petitioner was accused in the first information report and in this regard relied upon the statement made in paragraph 5 of the counter affidavit from where it appeared the aforementioned fact in this regard was made by inserting the words "an accused in the said" by pen after the words "The petitioner is" and before the words "First Information Report" and cutting the typed words "accused and has been later made a co-accused in the matter" after the words ''First Information Report'', this Court asked learned counsel to produce the instruction given by the Board on the basis of which the said affidavit was sworn. Learned counsel for the Board produced the typed copy of the instructions given by the Board, on perusal wherein it transpired that according to the instruction the petitioner was not an accused in the F.I.R. yet in paragraph 5 of the counter affidavit the change was later inserted, this obviously was against the typed copy of the instruction produced by Mr. Jha before this Court.

4. Office order of the Board dated 19.7.1996, contained in Annexure-A to the counter affidavit also showed that on perusal of letter no. 323 dated 24.1.96 and its enclosures from the D.I.G. (Vig) of the Board in connection with Vigilance P.S. Case No. 5/89, the Board accorded sanction on the basis of subsequent detection during investigation by the I.O. for prosecution under Sections 409, 420, 465, 467, 468, 471, 120(B), 201 IPC. 13(1)/13(2), Prevention of Corruption Act, 1988 and 39/39A Indian Electricity Act, 1910.

5. Thus, this Court get the matter listed under the heading ''For Orders'' on 24.8.1999 for supplying the date and certified copy of the charge sheet. As learned counsel for the parties were not in a position to supply the date of filing of the charge sheet against this petitioner on that date, this Court asked them to supply the date and copy of the certified copy of the charge sheet submitted against the petitioner, which has been supplied along with photostat copy of the first information report. From perusal of the first information report, it appears that only Anandi Ram, Electrical Superintending Engineer, Electric Supply Circle, Jasmshedpur, Vijay Bhushan Prasad, Electrical Executive Engineer, Electric Supply Division, Jamshedpur, Subodh Narain, Assistant Electrical Engineer, Electric Supply Sub-division, Adityapur (II), Braj Kishore Jhawat, Proprietor of M/s Usha Alloy & Steel Limited and O.P. Kapila, Chief Executive Officer, M/s Usha Alloy & Steel Limited, Gamharia were made F.I.R. accused. A photostat copy of the charge sheet in which the petitioner''s name also finds place in the column of the accused was produced and from perusal thereof it appears that the same bears charge sheet no. 35 dated 4.11.1996. Thus, it is evident that a malafide attempt has been made to mis-lead this Court by making false statement in paragraph 5 of the counter affidavit in regard to the petitioner being an accused in the F.I.R. just to deprive the petitioner of his legitimate claim, which is strongly deprecated.

6. Learned counsel appearing for the petitioner has submitted that copy of the evidence relating to charge in the criminal case, contained in Annexure-10 to the supplementary affidavit, shows that the charge against this petitioner relates to the period while he was posted as Electrical Executive Engineer from 25.8.1981 to 9.8.1985 and the last event which took place was 4.3.1985 when it is alleged that the petitioner ordered for average billing on the electrical load of 11.5 M.V.A. when the increase of 13 M.V.A. load had already been made before that. It is, thus, submitted that as per the provisions contained in Rule 43(b) of the Bihar Pension Rules under which the Respondents purported to have acted as claimed in the counter affidavit, the pension of the petitioner cannot be withheld on account of pendency of judicial proceedings relating to an event which took place beyond four years before the institution of the said proceedings against him. In support of this he placed reliance on the decision of the supreme court in the case of State of Bihar vs. Md. Idris Ansari, reported in 1995 (2) P.L.J.R. (SC) 51. It was further submitted by the learned counsel for the petitioner that in any view of the matter, the Respondent-Board was not legally justified in withholding the payment of the amount of gratuity and leave encashment. According to the learned counsel, right to gratuity is statutory right and withholding of gratuity

payable to the employee after retirement as a measure of punishment is not permissible. In support of this he placed reliance on the decision of the Supreme Court in the case of D.V. Kapoor Vs. Union of India and others, . As regards, leave encashment it was submitted by the learned counsel for the petitioner that even under Rule 43(b) the State Government have been empowered to withhold or withdraw pension or any part of it. According to the definition of pension under Rule 27 of the said Rule includes a gratuity and not any other post-retiral benefits, like Government Provident Fund or leave encashment, as such, according to the learned counsel, the action of the Respondent-Board in withholding the payment of leave encashment is wholly unwarranted in law.

7. Learned counsel for the Board fairly agreed that while exercising the power under Rule 43(b) withholding of the amount of leave encashment is not permissible, but contended that after careful consideration dealing with the issue with regard to payment of cash in lieu of unavailed period of earned leave and commutation of pension of the employees/officers of the Board committed irregularity and faced charges which remained undecided till the date of superannuation, the Board vide Standing Order no. 784 dated 21.8.1997 contained in Annexure-B, decided that commutation of pension and payment of cash in lieu of unavailed period of leave may be sanctioned only after the charges against the concerned employee/officer are closed.

8. This Court fails to appreciate as to how the said Standing Order is of any help to the learned counsel for the Board. The petitioner superannuated from service of the Board on 31.10.1996 and the said Standing Order came into force with immediate effect i.e. 21.8.1997 when the petitioner had already superannuated and right to get the leave encashment had accrued in him on 31.10.1996 itself. No other provision has been brought to the notice of this Court by the learned counsel for the Board in exercise of which the Board could have withheld the payment of the amount in lieu of unavailed period of earned leave (leave encashment). The Board, thus, even on account of pendency of the Vigilance case was not legally justified in withholding the payment of the amount of leave encashment.

9. It is true that in the case of D.V. Kapoor vs. Union of India (supra) the Apex Court on consideration of the provisions contained in Rule 9 of the Central Civil Services (Pension) Rules, 1972, Civil Services Conduct Rules, 1964 and the Payment of Gratuity Act, 1972 held that exercise of power by the President is hedged with a condition precedent that in absence of finding recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct and negligence in discharge of his duty while in the office, withholding of gratuity after retirement is not permissible except as a measure of punishment. But the larger Bench of the Apex Court in the case of Jarnail Singh Vs. The Secretary, Ministry of Home Affairs and others, on consideration of the definition of Pension contained in Rule 3 of C.C.S. (Pension) Rules 1972 and Rule 9 of the said Rules distinguished the decision given in the D.V. Kapoor''s case and

held that on reading of paragraph 10 of the said judgment, wherein it was stated that no provision of law was shown to indicate that the President is empowered to withdraw gratuity as well and on consideration of the definition of the term Pension in Rule 3(1)(o) declined to agree with the observation made in D.V. Kapoor''s case to the effect that the power of President in Rule 9 prior to its amendment in 1991 was confined only to withholding pension and it did not extend to gratuity as well. In Bihar Pension Rules pension has been defined in Rule 27 and it includes a gratuity. Rule 43(b) of the said Rules vests power in the State Government to withhold or withdraw pension or any part of it subject to riders mentioned therein and under Rule 139 (b) the authority sanctioning the pension has been vested with the power to make such reduction in the amount as it thinks proper. Under its clause (c), the State Government has been vested with the powers of revising an order relating to pension passed by Subordinate authorities under their control, if they are satisfied that the service of the pensioner was not thoroughly satisfactory or that there was proof of grave misconduct on his part while in service. There is, however, rider in exercise of said power wherein the pensioner concerned is to be afforded a reasonable opportunity of showing cause against the action proposed to be taken in regard to his pension and such power shall not be exercised after the expiry of three years from the date of the order sanctioning the pension was first passed.

10. For the exercise of the aforementioned power under clause (b), the State Government vide FD Memo No. PC-11-40-72/75-975F, dated 19.1.1976 in anticipation of the amendments to be made in the said Rule issued direction that sanctioning authority before exercising such power shall serve upon the person concerned a notice specifying the reduction proposed to be made in such amount and the grounds therefor, and call upon such person to submit within fifteen days of the receipt of the notice or such further time as may be allowed by that authority such representation as such person may wish to make against the proposed reduction and take into consideration the representation, if any, submitted by such person before passing the final order.

11. In the case of High Court of High Court of Punjab and Haryana Vs. Amrik Singh, , decided by the Supreme Court the facts of the case were that while he was working as Selection Grade Superintendent in the High Court of Punjab & Haryana had attained his superannuation after reaching 58 years of his age on 31.8.1980. The Chief Justice of the High Court had extended his tenure by two years and thereby he was to retire after expiry of re-employment period on 31.8.1982. During his re-employment, it had come to the knowledge of the Chief Justice that he had committed misconduct of embezzling the funds of the High Court. Therefore, he was kept under suspension on 17.12.1981 and charge sheet was issued after enlistment of three specific charges against him on the grave charge of embezzlement. On expiry of two years he was allowed to retire. After conducting the enquiry by the District Judge and after receipt of the report in that behalf complying with Article 311(2) of the Constitution and the relevant Rules, the Chief Justice on the administrative side dismissed him from service by

his orders dated 7.6.1983 and 31.8.1983 with immediate effect. On appeal, as per the Rules, the Division Bench on administrative side confirmed the order on 24.1.84 which was under challenge in the writ filed before the High Court, Writ petition was allowed and the High Court of Punjab and Haryana filed appeal in Supreme Court. The Apex Court on consideration of the said facts held that "............the Chief Justice was not apprised that the delinquent had already been retired from service on completion of two years'' period of extended service of re-employment with effect from 31.8.1982. Therefore, the order of giving effect to the order of dismissal from the date of its order was of no consequence and became superfluous as he was no longer in service as on that date."

12. In the case of State of U.P. vs. Sri Krishna Pandey (supra), Supreme Court was considering the fact that officer had retired on 31.3.87 and the proceedings were initiated on 21.4.91 and thus on consideration of Regulation 351-A of the Civil Services Regulation, which is in pari materia to Rule 43(b) of the Bihar Pension Rules and the fact that the event of embezzlement which caused pecuniary loss to the State took place prior to four years from the date of his retirement held that the State has disabled itself by their deliberate omissions to take appropriate action against the Respondent and allowed the Officer to escape from the provisions of Regulation 351-A of the Regulations. While dealing with the question that whether the proceedings are required to be instituted against the delinquent Officer before retirement, the apex Court on consideration of the scope of Rule 351-A, which is in pari materia to the provisions of Rule 43(b) of the Bihar Pension Rules held that in absence of specific provision allowing the Officer to continue in service nor any order passed to allow him to continue on re-employment till the enquiry is completed, without allowing him to retire from service there is no provision that the proceeding be initiated as disciplinary measure and the action initiated earlier would remain unabated after retirement. It was, however, further observed that if Regulation 351-A is to be operative in respect of pending proceedings by necessary implication, prior sanction of the Governor to continue the proceeding against him is required. It is, thus, quite manifest that the Apex Court also had doubt that Regulation 351-A can be, made operative in respect of pending proceedings by necessary implication but even if such interpretation was possible, the Apex Court felt the necessity of complying with the requirement of the terms provided in the proviso to Regulation 351-A which requires sanction of the Governor even in respect of pending proceedings and not that the other requirement of the proviso to the said Regulation shall not apply to the pending proceedings.

13. According to the Respondent-Board, the ground for withholding of pension is pendency of judicial proceedings against the petitioner. According to the decision of the Apex Court in the case of State of Bihar vs. Md. Idris Ansari (supra) before the power under Rule 43(b) can be exercised in connection with alleged misconduct of a retired Government servant, it must be shown that in departmental proceedings or judicial proceedings, the Government Servant concerned is found guilty of grave misconduct, and this is also subject to the

rider that such departmental proceedings shall have to be in respect of misconduct which took place not more than four years before the initiation of such proceedings. This was obviously held as per the requirement contained in sub-clause (ii) of clause (a) of the proviso to Rule 43(b) which empowers the State Government to institute departmental proceedings even after retirement but should be in respect of an event which took place not more than four years before the institution of such proceeding. Clause (b) of the said proviso provides for institution of judicial proceeding with similar rider as provided in sub-clause (ii) of clause (a) i.e. which shall be in respect of an event which took place not more than four years before the institution of such proceeding. Under sub-clause (i) of clause (b) of the explanation to the said Rule, a judicial proceedings shall be deemed to have been instituted in the case of criminal proceeding, on the date on which a complaint is made or a charge sheet is submitted to a criminal court.

14. From the aforementioned facts, it is apparent that the petitioner was not made accused when F.I.R. was lodged and as such the date of institution of judicial proceeding in his case shall be the date on which charge sheet was submitted against him i.e. 4.11.1996.

15. Learned counsel for the Board, however, submitted that in view of the provisions contained in Finance Department Memo no. PC-11-440-28/74/9144F, dated 22.8.1974 and FD Memo No. PC-11-40- 98/74/11260F, dated 31.10.1974, during the period of suspension of a Government Servant or pendency of the Departmental or Judicial Proceedings or enquiry against him on the date of compulsory retirement, Government Servant will be entitled for only 75% provisional pension, which would have been admissible on the basis of his qualifying service up to the date of retirement or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders thereto. According to the learned counsel in absence of specific Rule framed by the Board in this regard, the Rule and the instructions issued by the State Government apply mutatis mutandis to the employees of the Board. As such, according to him, the Respondent-Board is justified in withholding the gratuity amount during the pendency of the judicial proceedings.

16. This Court is unable to accept the said submissions of the learned counsel for the Board. Even according to the said Government instructions such payment of provisional pension are to be made only where any departmental or judicial proceeding is instituted under Rule 43(b) of the Bihar Pension Rules. Under Rule 43(b) and 139 of the Bihar Pension Rules, the authority sanctioning the pension has been vested with the power to make such reduction in the amount as it thinks fit and proper if the service has not been thoroughly satisfactory or that there was proof of grave misconduct, but under the aforementioned F.D. Memo No. 975F dated 19.1.1976 no such power can be exercised without giving the

pensioner concerned a reasonable opportunity of showing cause against the action proposed to be taken in regard to his pension and under Rule 139(c) power can be exercised only after complying with the said Rule and not after the expiry of three years from the date of the order sanctioning the pension was first passed. The scope of the said rules was considered by the Apex Court in the case of State of Bihar vs. Md. Idris Ansari (supra).

According to the Apex Court in the case of State of Bihar vs. Md. Idris Ansari (supra) on conjoint reading of Rule 43(b) and Rule 139 the following picture emerges :

I. A retired Government servant can be proceeded against under Rule 139 and his pension can be appropriately reduced if the sanctioning authority is satisfied that the service record of the respondent was not thoroughly satisfactory.

II. Even if the service record of the concerned officer is found to be thoroughly satisfactory by the sanctioning authority and if the State Government finds that it is not thoroughly satisfactory or that there is proof of grave misconduct against the concerned officer during his service tenure, the State Government can exercise revisional power to reduce the pension but the revision is also subject to the rider that it should be exercised within 3 years from the order sanctioning pension was first passed in his favour by the sanctioning authority and not beyond the period.

17. The Apex Court while dealing with second type of cases held that the proof of grave misconduct on the part of the concerned Government servant during his service tenure will have to be culled out by the revisional authority from the departmental proceedings or judicial proceedings which might have taken place during his service tenure or from departmental proceedings which may be initiated even after his retirement in such type of cases. But such departmental proceedings will have to comply with the requirement of Rule 43(b). Consequently a retired Government servant can be found guilty of grave misconduct during his service career pursuant to the departmental proceeding conducted against him even after his retirement, but such proceedings could be initiated in connection with only such misconduct which might have taken place within four years of the initiation of such departmental proceedings against him.

18. Here in this case, it is not the case of the Respondents that any departmental proceeding was initiated against the petitioner before his retirement or after his retirement in terms of the provisions contained in Rule 43(b). It is neither the case of the Respondent-Board that the petitioner was found in departmental or judicial proceeding guilty of grave misconduct or to have caused pecuniary loss to the Government by negligence or misconduct during his service. The Respondents have only pleaded about the pendency of the judicial proceedings against the petitioner for exercise of the power by them under Rule 43(b). In my opinion, in view of the law settled by the Apex Court in the case of D.V. Kapoor (supra) and State of Bihar vs. Md. Idris Ansari (supra) the provisions contained

in Rule 43(b) cannot be invoked in the case of the petitioner for withholding of pension. This power cannot be exercised before the pensioner is found in departmental or judicial proceeding guilty of grave misconduct, or for causing pecuniary loss to the Government by misconduct or negligence, during his service.

19. The proviso to Rule 43(b) only empowers the State Government to initiate departmental or judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment with certain riders as already mentioned above.

20. Apparently in view of the rider provided in sub-clause (b) of proviso to Rule 43(b) the judicial proceeding initiated against the petitioner in respect of an event which took place beyond four years before the institution of the said proceeding against the petitioner, it cannot be said that the case of the petitioner is covered by the said provision for withholding of pension. As such the reliance placed by the learned counsel for the Board on the aforementioned Finance Department''s memo dated 31.10.1974 is completely misplaced and not tenable. Moreover, this Court finds it difficult to uphold the validity of the said Government circular purported to have been issued under Rule 43(b), which apparently is in the teeth of the statutory provision. The Government in exercise of the statutory power cannot override or negate the effect of the statutory provision.

21. Here undisputedly the petitioner has not been found guilty of grave misconduct either in the departmental proceeding or in the judicial proceeding. Even the judicial proceeding pending against him is in respect of the alleged misconduct which took place much beyond four years before the initiation of such proceeding, as is also evident from the fact that according to the evidence of charge (Annexure-10) the petitioner alleged to have committed misconduct on 4.3.1985 and the F.I.R. was lodged on 16.6.1989 in which he was not made accused. Thus, it is quite obvious that the events relate to the time which is more than four years before even lodging of the F.I.R. of Vigilance P.S. case No. 5 of 1989, in which the petitioner was not made an accused and judicial proceeding against him was instituted only after submission of charge sheet on 4.11.1996 i.e. after eleven years of the alleged event taking place. Accordingly, this Court finds that the action of the Respondents in withholding the remaining post-retirement dues of the petitioner was wholly arbitrary, malafide and unwarranted in law.

22. This writ application is, accordingly, allowed. The Respondent are directed to pay the remaining post-retiral dues to the petitioner with interest @ 10% per annum to be calculated from due date till payment is made within two weeks of the receipt/production of the copy of this order. Having regard to the fact that false affidavit has been filed on behalf of the Respondent-Board in regard to the petitioner being an accused in the F.I.R. and according to the decision of the Apex Court in the case of Dhananjay Sharma Vs. State of Haryana and Others, ,

swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. According to the Apex Court filing of false affidavit or making false statement on oath in Courts aims at striking a blow at the Rule of law and no court can ignore such conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statement and fabricating false evidence in a court of law. The Supreme Court held that the stream of justice has to be kept clean and pure and anyone soiling its purity must be dealt with sternly so that the message percolates loud and clear that no one can be permitted to undermine the dignity of the Court and interfere with the due course of judicial proceedings or the administration of justice. The quotation in the said judgment from the earlier decision of the Apex Court in the case of Chandra Shashi Vs. Anil Kumar Verma, shows that such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deter others from indulging in similar acts which shake the faith of people in the system of administration of justice. As such, this Court finds it to be a fit case for at least awarding exemplary cost of Rs. 25,000/- to be deposited by the Respondent-Board within two weeks with the Secretary, Patna High Court Council for Legal Aid and Advice. The Board shall realise the said amount of cost from the erring person.