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**(1999) 09 PAT CK 0023**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 221/99**

Satyendra Narain Sinha @ Dr. Satyendra Narain Sinha APPELLANT  
Vs  
The State of Bihar and Others RESPONDENT

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**Date of Decision :** 17-09-1999

**Acts Referred:**

Constitution of India, 1950 — Article 309, 31(1)  
Government of India Act, 1935 — Section 241

**Citation :** (1999) 3 PLJR 939

**Hon'ble Judges :** Radha Mohan Prasad, J

**Bench :** Single Bench

**Advocate :** Chittaranjan Sinha, for the Appellant; G.P. Rai for the State and Mr. J.P. Karn for Accountant General, for the Respondent

**Final Decision :** Allowed

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## Judgement

Radha Mohan Prasad, J.—Heard leaned counsel for the parties. In this writ petition the petitioner is aggrieved by govt. order dated 1.12.1996 issued by the Deputy Secretary, Water Resources (Irrigation) Department (respondent no. 4) as contained in Annexure 12, whereby and whereunder during the pendency of Vigilance P.S. Case No. 53 of 1990 the petitioner was held to be not entitled for full pension and gratuity and a direction has been issued for approval of pension and gratuity on provisional basis. The petitioner is also aggrieved by order dated 2.5.1997 issued by the Accounts Officer (Administration), Water Resources Department, contained in Annexure 11, whereby approval has been accorded for payment of only 90% of the amount payable towards the leave encashment.

2. The relevant facts are that the petitioner superannuated on 30.6.1995 from Water Resources Department as Accounts Officer at Jamshedpur. On 29.11.1990 F.I.R. was lodged against the Engineers and Officials with respect to purchase of goods of the Water Resources Department at higher rate. The petitioner was also made one of the accused giving rise to the aforementioned Vigilance P.S. Case No. 53 of 1990. Thereafter the petitioner was taken in custody and later released

on bail by this Court by order dated 7.1.1993. Vide order dated 22.2.1993 the petitioner was placed under suspension with effect from 18.12.1992 under Rule 100 of the Bihar Service Code. Thereafter the petitioner filed a writ petition bearing C.W.J.C. No. 1105 of 1995, whereafter, the order of suspension was revoked vide order dated 21.4.1995 (Annexure 6), but after inflicting certain punishment and he was posted at Jamshedpur from where he superannuated on 30.6.1995 while posted as Accounts Officer. The payment of pensionary benefits vide sanction orders as contained in Annexures 11 and 12 were passed only for 90% of the amount due.

3. The Learned Counsel for the petitioner has submitted that under the Bihar Pension Rules the State Government is vested with the power of withholding or withdrawing pension or any part thereof whether permanently or for specified period only if the pensioner is found guilty in judicial or departmental proceeding for misconduct for his negligence during his service period and not otherwise.

4. In the instant case the validity of the order inflicting several punishments on the petitioner, without there being any departmental proceeding was challenged by the petitioner in C.W.J.C. No. 3200 of 1995, in which this Court vide order dated 13.9.95 contained in Annexure 8, relying upon the decision of the Supreme Court in the case of Kulwant Singh vs. State of Punjab reported in 1991 (1) S.C.C. 504, quashed the said order of punishment and allowed the writ petition. this Court further directed that since the petitioner had already superannuated no purpose would be served in remanding the case to the respondent-authority. Thus according to the Learned Counsel for the petitioner there is no finding whatsoever either in departmental proceeding or for judicial proceeding against the petitioner in which he has been held guilty for misconduct or being negligent so far. It is thus submitted that under such circumstance the orders withholding the pensionary benefits of the petitioner contained in Annexures 11 and 12 cannot be sustained. In support of his contention the Learned Counsel for the petitioner has placed reliance upon the decision of the Division Bench of this Court in the case of Bajrang Deo Narain Sinha Vs. The State of Bihar and Others, .

5. The learned Additional Advocate General No. 3, appearing for the respondent-State has tried to defend the impugned orders on the basis of the Circular of the Finance Department contained in Memo No. C-11- 4028/74/9144-F., dated 2.8.74 read with Finance Department's Memo No. PC-11-40-98/74/11216-F., dated 31.10.74 and Finance Department's Resolution No. 3014 dated 31.7.80, in which a provision has been made for payment of 90% provisional pension to such pensioner against whom a departmental or judicial proceeding is pending. He also placed reliance on Rule 139(b) of the Bihar Pension Rules.

6. this Court fails to appreciate as to how such an executive order can exist in the eye of law which runs in conflict to the power in that regard vested under Rules 43 and 139 of the Bihar Pension Rules, framed under clause (b) of subsection (2) of Section 241 of the Government of India Act, 1935 vide

Notification No. F.D. 100-E., dated 20th January, 1950 and later adopted vide General Notification No. 3555-36-27/50A dated 15th April, 1950 published in Part II of the Bihar Gazette dated 26th April, 1950 adopting existing Service Rules and Orders in Bihar in force before the 26th January, 1950 under Article 309 of the Constitution of India which specifically provides that power of withholding or withdrawing pension or any part thereof whether permanently or for specified period is to be exercised if the pensioner is found guilty in judicial or departmental proceeding. By issuance of the said executive orders an attempt has been made to supplant the statutory provision itself which is not permissible in law. By the executive orders gaps in rules can be filled up or the statutory rules can be supplemented but must not tend to repeal the same (See the case of Mrs. Rekha Prasad vs. State of Bihar & others reported in 1984 B.B.C.J. 833 Para 7). In other words what is permissible in law is that the executive order can supplement where the statutory provision is silent and not that it can supplant it. (See the case of Comptroller and Auditor General of India and others Vs. Mohan Lal Mehrotra and others, ). Moreover, exercise of such power to deprive a pensioner of his legitimate right to get full pension without there being any finding of guilt is wholly arbitrary and violative of the principles of natural justice inasmuch as a pensioner though under the statutory provision is entitled for full pensionary benefits unless there is finding of guilt against him in a departmental or judicial proceeding has been sought to be deprived of it under the said executive order merely because of the pendency of any kind of accusation in a departmental or judicial proceeding, which amounts to imposing punishment even before trial. There is no such power vested under any other statutory provision for withholding of any amount of pension under the pendency of either departmental or judicial proceeding. Even the power of withholding of any amount of salary in the case of suspension of a Government servant is vested under the statutory rules and that too also appears to be based on the principle of "no work no pay" where no person can claim full salary as a matter of right. Here it is true that under Rule 139(a) of the Bihar Pension Rules the full pension admissible under the rules is not to be given as a matter of course or unless the service rendered has been really approved, but before such exercise of power the sanctioning authority is required to serve upon 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 his representation as he may wish to make against the proposed reduction and then to take into consideration the representation before passing the final order as per the Government Circular contained in Finance Department's Memo No. PCM-40-72/75-975-F., dated 19.1.1976, which can be said to be in consonance with the principle behind the exercise of power under Rule 43 of the Bihar Pension Rules and may not have the effect of nullifying the provision contained in Rule 43. Rule 139 of the Bihar pension Rules cannot be read in isolation which would nullify the effect of Rule 43 under which the power to withhold or withdraw the amount of pension or any part thereof whether permanently or for specified period is to be exercised only when the pensioner is found guilty in judicial or departmental proceeding and not

otherwise. A reference in this regard can be made to the decision of the Apex Court in the case of State of Bihar and others Vs. Mohd. Idris Ansari, in which the scope of Rules 43 and 139 of the Bihar Pension Rules was under consideration. Moreover Rule 139(a) has to be read in the context of its sub-rule (b) which empowers the sanctioning authority to make such reduction in the amount of pension where the service has not been thoroughly satisfactory and not where a departmental or judicial proceeding is pending.

7. The grant of pension does not depend upon an order being passed by the authorities to that effect. The right to receive pension flows to the officer/employees not because of any order but by virtue of the rules. (See Deokinandan Prasad Vs. The State of Bihar and Others, . In the said case the Constitution Bench has held that right of Government servant to receive pension is his property under Article 31(1) of the Constitution of India and by a mere executive order the State has no power to withhold the same in the case of Sudhir Chandra Sarkar Vs. Tata Iron and Steel Co. Ltd. and Others, the Apex Court held that pension and gratuity are both retrial benefits ensuring that the workman who has spent his useful span of life in rendering service and who never got a living wage, which would have enabled him to save for a rainy day, should not be reduced to destitution and penury in his old age. As a return of long service he should be assured social security to some extent in the form of either pension, gratuity or provident fund whichever retrial benefit is operative in the industrial establishment. It must not be forgotten that it is not a gratuitous payment, it has to be earned by long and continuous service.

8. In the case of D.S. Nakara and Others Vs. Union of India (UOI), the Supreme Court opined that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer nor an ex gratia payment.

9. The Division Bench of this Court in the case of Bajrangdeo Narain Sinha vs. State of Bihar & others (supra) held that pensionary dues payable to the appellant including gratuity, which is also pension within the meaning of the Bihar Pension Rules, cannot be withheld till such time as an order is passed under Rule 43(b) of the Bihar Pension Rules. Similarly, the leave encashment dues also cannot be withheld since that is paid in lieu of the unutilised leave and, therefore, partakes the character of salary. Accordingly, the impugned orders dated 2.5.1997 and 12.12.1996 contained in Annexures 11 and 12 cannot be sustained. The writ application is thus allowed and the said impugned orders contained in Annexure 11 and 12 are quashed. The respondents are directed to release the remaining pensionary benefits of the petitioner within two weeks of the receipt/production of the copy of this order.