

**(1999) 04 PAT CK 0071**

**In the Patna High Court**

**Case No :** C.W.J.C. No's. 4806 of 1993 and 7131, 8532, 9444, 9671 and 9701 of 1997

S.M. Qamaruzzama and Others

APPELLANT

Vs

Rajendra Agriculture University and Others

RESPONDENT

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**Date of Decision :** 16-04-1999

**Acts Referred:**

Constitution of India, 1950 — Article 313  
Government of India Act, 1935 — Section 241

**Citation :** (1999) 2 BLJR 1347 : (1999) 9 PLJR 749

**Hon'ble Judges :** A.K. Ganguly, J

**Bench :** Single Bench

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## **Judgement**

A.K. Ganguly, J.—All these batches of cases are heard together as the questions of law which fall for consideration before this Court are common in all these Writ Petitions. Factually, also the cases have great deal of similarity with some minor variations.

2. The facts in C.W.J.C. No. 8532 of 1997 are noted hereinbefore : The petitioner joined the Bihar Agriculture Service on 20th June, 1956 as a Junior Research Assistant and subsequently promoted to the post of Senior Assistant Research Officer which is also unknown as Assistant Recruitment Officer, with effect from 14.10.1961. Rajendra Agriculture University (hereinafter referred to as the said University) was created in 1971 and most of the Government employees who conducted research and were imparting education in the agriculture field, were absorbed in the newly-created University and as such they submitted their resignation and the petitioner also submitted his resignation, and the petitioner's services were absorbed in the said University with effect from 1.7.1986. Thereafter, the petitioners retired from the services of the said University as Assistant Professor/Assistant Research Officer on 31st July, 1994.

3. As the proportionate pension of the petitioner for the period for which he was employed in the State Government was not paid despite demands, the petitioner

filed a writ petition before this Hon"ble Court which was numbered as C.W.J.C. No. 4192 of 1994 along with others, and the same was disposed of with certain directions to the State Government for realisation of proportionate pension and gratuity. Ultimately, the petitioner attained 60 years of age and was superannuated from the University service from 31st July, 1994. Thereafter, the University sanctioned pension and gratuity by its office order dated 2.2.1995. Then, for some other disputes relating to payment of unutilised leave salary, Group Insurance and so on, the petitioner filed a writ petition before this Court for realising the same. The said writ petition was numbered as C.W.J.C. No. 1692 of 1996. Those disputes were settled on the basis of some orders passed by this Hon"ble Court and those disputes are not the subject-matter of the present writ petition. Therefore, this Court is not considering those facts in detail here.

Facts in C.W.J.C. No. 9701 of 1997

4. In this case, the petitioner was appointed in the year, 1955 as Junior Research Assistant in the Department of Agriculture, Government of Bihar. On 11th July, 1981 the petitioner resigned from the service of the State Government and the same was accepted by the Agriculture Department Government of Bihar with effect from 31st March, 1977. Thereafter, the petitioner was absorbed in the University service on 20th March, 1979 with effect from 1st April, 1977, and was promoted to the post of Senior Scientist-cum-Associate Professor. On 31st July, 1993, the petitioner retired from the service of the University. Then on 2nd December, 1994, the University sanctioned the payment of proportionate pension and gratuity payable by them after deducting the amount of pension and gratuity payable by the State Government. But As retirement benefit was not paid by the University, the petitioner filed C.W.J.C. No. 784 of 1995. The said writ petition was disposed of by this Hon"ble Court by an order dated 6.8.1996 directing payment of admitted dues of the petitioner along with interest. Thereafter, on 7.2.1997 pursuant to the said direction of the Hon"ble Court, the State Government sanctioned the payment of proportionate pension with effect from 1.4.1977. In this case also circular No. 241 dated 29.1.1997 and its communication by letter dated 15.3.1997 has been challenged.

Facts In C.W.J.C. No. 9671 of 1997.

5. In this case, the petitioner was appointed in the department of Agriculture, Government of Bihar on 26.11.1956. Thereafter, option was asked from the petitioner for absorption in the University service. On 11th July, 1981 resignation of the petitioner from the State Government's service was accepted by the Agriculture Department, Government of Bihar with effect from 31st March, 1977, and the petitioner was absorbed in the University service with effect from 1.4.1977, and was promoted to the post of Senior Scientist-cum-Associate Professor. In this case also, the writ petitioner filed C.W.J.C. No. 151 of 1995 and the same was disposed of by a learned Judge of this Court on 31st December, 1993. Thereupon, the University granted full pension. By an order dated 5th October, 1996, the University modified its earlier sanction order and sanctioned

proportionate pension deducting the proportionate pension of Rs. 238/- payable by the State Government. In this case also, Circular No. 241 dated 29.1.1997 and subsequent circular dated 15.3.1997 have been challenged.

Facts In C.W.J.C. No. 7131 of 1997

6. In this case on 2.9.1992, the petitioner was appointed in the Agriculture Department, Government of Bihar as Junior Research Assistant. Thereafter, on 6th July, 1978, option for absorption in the University service was asked and the petitioner resigned from the service of the State Government, and the said resignation of the petitioner was accepted on 31st March, 1977, and the petitioner was absorbed in the University service with effect from 1.4.1977. The petitioner retired on 5.3.1993 from the services of the University as University Professor-cum-Chief Scientist, and on 7th September, 1994 the University sanctioned the payment of proportionate pension to the tune of Rs. 2,016/- and also relief per month. In this case also, similar challenge has been raised by the petitioner and the petitioner has prayed for quashing the order dated 30.5.1997 by which it has been stated that the proportionate pension has been wrongly sanctioned to the petitioner.

Facts in C.W.J.C. No. 9444 of 1997

7. In this case, the petitioner was appointed on 1st January, 1955 in the Department of Agriculture, Government of Bihar and has been confirmed on the post of Senior Asstt. Cerelist with effect from 8.1.1957. The petitioner was absorbed in the services of the respondent-University on 10.6.1986, and the petitioner's resignation was accepted by the State Government with effect from 1.9.1983 and on 5.3.1993 the petitioner retired as Senior Scientist-cum-Associate Professor, and pension of the petitioner was not paid. Then, the petitioner filed a writ petition being C.W.J.C. No. 11314 of 1993, and the same was disposed of by a learned Judge of this Court. In this case, also the University stopped payment of proportionate pension to the petitioner and issued a circular regarding the payment of proportionate pension on 29.1.1977, and the University informed the petitioner that the pension has been withheld vide communication dated 15.3.1997. In this case, the petitioner also challenged the Circular No. 241 dated 29.1.1997 and its communication dated 15.3.1997.

Facts in C.W.J.C. No. 4806 of 1993

8. The petitioner was appointed to a Class-II (Senior Branch) post of Research Officer in Animal Husbandry Department. His services were deputed to the respondent University with effect from 1.2.71. Then, the petitioner was promoted on 28.3.73 as Class-I Animal Husbandary Officer. The petitioner's resignation from State Government was accepted with effect from 31.3.77 and he was appointed as the University Professor by notification dated 28.3.1979.

Then, the services of the petitioner was transferred from Rajendra Agricultural University to Bisra Agricultural University, Kanke (Ranchi). Then on the basis of

option exercised by the petitioner, his services were transferred again to Rajendra Agricultural University in January 1984. The petitioner retired from the Agricultural University on 31.12.1988 from the post of Professor-cum-Chairman Department of Veterinary. Micro Biology, Rajendra Agricultural University, Bihar Pusa.

In this case, the question of bunching benefits has been urged. Those benefits appear to be the benefits available for fixation of pay-scale. The relevant. Instructions in this regard are set out below:

Wherein the fixation of pay under Clause (b) of Paragraph (A) or Paragraph (B) the pay of a teacher drawing pay at more than five consecutive stages in an existing scale gets bunched, that is to say, gets fixed in the revised scale at the same stage, the pay in the revised scale of such of these teachers who are drawing pay beyond the first five consecutive stages in the existing scale shall be stopped up to the stage where such Bunching occurs as under, by the grant of increment(s) in the revised scale in the following manner, namely,

(a) For teachers drawing pay from the 6th up to 10th stage in the exiting scale, by increments.

(b) For teachers drawing pay from the 11th upto the 15th stage in the existing scale, if there is bunching beyond the 10th stage-By two increments.

(c) for teacher drawing pay from the 16th upto 20th stage in the existing scale, if there is bunching beyond the 15th stage-by three increments.

If by stepping up of the pay as above, the pay of teacher gets fixed at a stage in the revised scale which is higher then the stage in the revised scale at which the pay of a teacher who was drawing pay at the next higher stage or stages in the same existing scale if fixed, the pay of the latter shall also be stopped up only to the extent by which it falls short that of the former.

In paragraphs 28 and 29 of the writ petition, it has been alleged that many teachers like the petitioner who were drawing their pay in the 15th stage onward have been granted bunching benefits but the same has been denied to the petitioner. In this connection, the petitioner has cited some examples in paragraph Nos. 29 and 35 of the writ petition.

In paragraph 6 of the counter-affidavit, respondents have denied that the petitioners entitlement to such bunching benefits.

9. Now, the main grievance which has cropped up in these batch of cases is over the letter written by the University authorities under the order of the Vice-Chancellor asking the petitioners to give particulars of the salary, etc. which they have received while working in the Government. This was done by Circular No. 241 dated 29.1.1997. The following clarifications were asked on the strength of Rule 161 of the Bihar Pension Rules (Hereinafter called the said rules:

IN CASE OF THOSE WHO HAVE ALREADY RETIRED AND HAVE received full salary

from the University and pension + relief from the Government. Simultaneously a detailed statement be prepared and the amount in excess, so received by them, the realised from their due claims and deposited in pension account special FI. No. I in P.N.B. Pusa, Samastipur.

Further, as per Bihar Pension Rules 158/159 all Government Servants working in the University be asked to declare as to whether they are in receipt of pension and relief from the Government? If they are in receipt of pension and relief from the Government, they be asked to submit a photocopy of P.P.O. duly attested with an information of present amount of pension and Relief being paid to them by the treasury and the same be forwarded to the Comptroller.

It has also been found that in so many such cases the incumbents have retired while availing such facility and are still drawing proportionate pension and relief from the State Government and at the same time from the University. As per rule, he is entitled to receive relief on total pension, i.e., State pension + University pension. Therefore, informations regarding payment of proportionate pension and relief being paid by the State Government be obtained immediately and payment of relief be regulated accordingly.

10. This is a common ground that the petitioners in these writ petitions are resisting the aforesaid query from the University and they are asserting that they have a right to receive proportionate pension and thereafter pay from the University. The petitioners are relying upon a Government clarification, in support of their stand. The said clarification which is in the nature of an Executive Instruction is set out below:

(iii) whatever pensionary benefits earned by a Government servant prior to his absorption will be allowed to him in addition to the pay he would get under the public undertaking:

(iv) Such a Government servant will have the option either:

(a) to receive the monthly pension and Death-cum-Retirement Gratuity already worked out under the usual Government arrangement.

(b) to receive the gratuity and a lump sum amount in lieu of pension worked with reference to commutation tables obtaining on the date from which the pro-rata pension, gratuity, etc. is desbursable.

The above option will have to be exercised in writing within a period of six months from the date of permanent absorption and communicated by the Government servant concerned to the Undertaking as well as to the Accountant-General, Bihar and the parent office concerned. A Government servant who opts for (a) above will also be entitled to the benefit of commutation of pension in accordance with the rules of the State Government. Where no option is exercised within the prescribed period, the Government servant concerned will be governed by (b) above.

(v) The Government would not accept any liability for family pension in case of Government servants permanently absorbed in Public Undertakings.

11. The learned Counsel for the respondent-University is relying on the provisions of Chapter-VIII of the Bihar Pension Rules, 1950, especially upon Rules 158, 159, 161 and 164.

Learned Counsel for the petitioner, however, submitted that the petitioner's service in the University, after they resigned from the State Government and were absorbed in the services of the said University, cannot be called a re-employment, as they have resigned from the Government service. As such the provisions of Rule 161 contained in Chapter VIII of the said Rules will not apply in their cases, but their cases will be governed by the clarification which has been pointed out above.

12. In deciding the aforesaid controversy, which is present in all the cases, this Court is not concerned either with the rate or the amount of pension which is to be made applicable to the petitioners. Such details are to be worked out by the respondents at their own level. This Court is merely concerned with the question of entitlement of the petitioner under the Rules.

Apart from the aforesaid question, this Court is also concerned with the objection raised by the respondent that the University authorities have merely asked the petitioners to submit certain particulars, and the petitioners instead of submitting those particulars, have come before this Court and filed these writ petitions. In the background of these facts the question is whether the action of the petitioners is justified or not.

13. In answering the first question whether the cases of the petitioners are governed the said Rules, this Court, finds that the cases are governed by the provisions of Chapter-VIII of the said Rules.

Rule 42 of the said Rules has made it clear that every pension shall be held to have been granted subject to the conditions contained in Chapter VIII. Therefore, the provisions of Chapter-VIII which contains Rules 157, 158, 159 and 161 are applicable to every grant of pension. Now these rules were made by the State Government under Clause (b) of Sub-Section (2) of Section 241 of the Government of India Act, 1935. So these rules have statutory force.

These rules were framed before the Constitution came. Now after the coming of the Constitution, under Article 313 of the Constitution, these rules shall continue in force unless other provision is made in this behalf. Therefore, those statutory rules are continuing and still in force, and continue to govern the cases of the petitioners in view of the provisions of Article 313.

Apart from that in the judgment of the Supreme Court identical questions arose in the cases of State of Bihar v. B.S. Mathur reported in 1996 (1) PLJR 69 (SC).

14. On the conjoint reading of the provision of Rule 161(b) of the said Rules and

Section 39 of the Rajendra Agriculture University Act, 1971 (hereinafter referred to as the said Act), the Hon"ble Supreme Court came to the following conclusion while construing the proviso of Rule 161 of the pension rules:

The proviso makes it clear that the sum total of pay plus pension would not exceed the substantive pay last drawn by him before discharge. In other words, if a Government servant opts for absorption in University Service after resignation from Government service, he is entitled to the sum total of pay plus pension which would not exceed the substantive pay last drawn by him before he had tendered his resignation and was discharged by the Government.

15. In view of the pronouncement of the Hon"ble Supreme Court it is not longer open to the petitioner to contend that the provisions of Rule 161 of the said Rules including its proviso are not applicable in the case of the petitioners.

So both under the statute and on the strength of the precedent Rule 161 of the said Rules have a binding force and are governing the cases of the petitioner.

Therefore, it is difficult for this Court to accept that the effect of the said governing rules can in any way be watered down by the so called miscellaneous provisions introduced by way of Executive Instruction as has been contended by the Counsel for the petitioners. It is well settled that the statutory rules cannot be amended, altered or in any way modified by any Executive Instruction.

Apart from that, this Court finds that on a closer scrutiny both the Executive Instruction and Rule-161 of the said rules can be harmoniously construed.

16. By the said Executive Instruction what has been said is that what ever pensionary benefit is earned by the Government servant prior to his absorption will be allowed to him in addition to pay he would get under the public undertakings.

From better appreciation of the question involved, Rule 161 is set out below:

161 (a) There is no bar to the re-employment or extension of the term of employment of a retired Govt. servant provided that (i) in the case of a person who has retired on an invalid pension, if he has regained his health or is considered fit in a branch of service other than that for which he has invalid and (ii) in the case of a person who has retired on a superannuation or a retiring pension his re-employment is on public grounds and has been sanctioned by the provincial Government.

(b) A Government servant on re-employment should draw the initial pay of the post unless Government sanction advance increments under Rule 83 of the Bihar and Orissa Service Code provided always that the sum total of pay plus pension does not exceed the substantive pay last drawn by him before discharge. Where the sum total exceeds the last substantive pay only so much of the pension may be allowed to the drawn as not to make the total of pension plus the initial pay of the post exceed the substantive pay last drawn.

17. But, under the clarification given by the miscellaneous provisions the amount of pay has not been quantified. Rule 161, as would appear from the provisions, quantifies it by restricting the pay certain maximum limits. So, there is no basic conflict between the two. But since a statutory rule would have its sway over any clarification by an Executive Instruction, such instructions must be read as subservient to the rule and not as one overturning the rules.

Apart from that, the Executive Instruction speaks of an option, without option, it cannot be worked out. It is not the petitioner's case that they exercised their option under that executive instruction. So without following the inherent condition in the matter of application of the Executive Instruction, they cannot contend that the University authorities are bound to follow it and are powerless to issue the impugned orders to seek clarifications, from them.

18. Therefore, on the basis of the principle of harmonious consideration, this Court finds that the amount of proportionate pension should not be reduced, but the amount of pay and pension together should not exceed the amount of substantive pay last drawn. However, it cannot be said that the petitioner will not get any pay on such re-employment, but what should be the quantum of pay has to be depended on the aforesaid calculation.

19. Thus, considering the rival contentions and for the reasons aforesaid, this Court is of the opinion that the University authorities have the right to seek clarification and particulars from the petitioners, and as such, the stand taken by them in letter dated 29.1.1997 and the communication dated 15.3.1997 cannot be interfered with by this Court.

20. The writ petitions are, therefore, disposed of with the following directions:

I. The petitioners are to reply to the queries of the University by furnishing the particulars within a period of two months from today.

II. After getting the replies from the petitioners the University authorities will re-fix the entitlement of the petitioners to receive pension having regard to the provisions of Rule 161 of the Bihar Pension Rules.

III. Such fixation should be made by the University within three months from the date of receipt of reply from the petitioners. If any of the petitioners refuse to furnish the reply, the University authority may fix it on their own within the said period on the basis of the records available to the University. This fixation of pension will apply prospectively.

IV. But, the direction for recovery of pension already paid to the petitioners, even erroneously, should not be given effect to either by the University or by the State Government. This Court is giving this direction in view of Supreme Court decision in the case of S.V. Bhima Bhatta and Another Vs. State of Karnataka and Others, .

V. So far, bunching benefits, urged in C.W.J.C. No. 4806 of 1993 are concerned, the same relate to fixation of pay. Such questions normally do not pertain to the

domain of Court. Hence the Court is not expressing any opinion on that controversy. The petitioner in C.W.J.C. No. 4806 of 1993 is given liberty to file, within two months from date, a proper representation to the chancellor about the same. If such representation is filed, Chancellor is requested to dispose of the same by a speaking order within three months of its receipt.

21. All the writ petitions are thus disposed of No. order as to costs.