

(2005) 11 PAT CK 0034
In the Patna High Court
Case No : L.P.A. No. 766 of 1998

State of Bihar and Others

APPELLANT

Vs

Ram Tawakya Singh and Others

RESPONDENT

Date of Decision : 17-11-2005

Acts Referred:

Citation : (2005) 11 PAT CK 0034

Final Decision : Dismissed

Judgement

J.N. Bhatt, C.J.—This reference has been pursuant to the observation made in the Division Bench judgment of this Court rendered in this Letters Patent Appeal No. 766 of 1998 : State of Bihar through the Commissioner-cum-Secretary, Housing Department, Government of Bihar and Ors. v. Ram Tawakya Singh and Ors. dated 3.2.2000, whereby, it was felt expedient that the matter needs to be placed before the larger Bench for consideration even after consideration of the Division Bench decision of this Court rendered in the case of State of Bihar and Others Vs. Smt. Shiv Rani Devi and Others, as there was another Division Bench decision of this Court rendered in Deena Nath Prasad v. The State of Bihar and Ors. reported in 1986 PLJR 405, wherein, it has been observed and held that a circular of the Government running contrary to the Rule Provision will not have any legal status and effect for the purpose of consideration of the provisions of Bihar Pension Rules, 1950. At this stage, in this back drop of facts, the matter was considered for reference to a larger Bench and, that is how, the matter has come up before us for consideration.

2. We have, extensively, heard learned counsel appearing for the parties. We have, also, threadbare screened, examined and evaluated the factual profile emerging from the record, as well as, from the submissions. We have, also, dispassionately, given our anxious thoughts and consideration to the observations and the facts of two Division Bench decisions referred in the reference order, as well as the content and colour of the order of learned Single Judge which came to be challenged in this Letters Patent Appeal.

3. With a view to appreciate the merits of reference and the rival submissions, we deem it expedient at this stage to highlight and articulate skeleton projection of spectrum of facts and chronological events which have relevance and material bearing to the consideration of the issue involved and the questions to be answered which are, shortly, stated herein as under :

(1) The petitioner came to be appointed on the post of Correspondence Clerk in the Housing Department of the State Government, on 23.5.1958,

(2) The Bihar State Housing Board, respondent No. 2, was notified on the Bihar Ordinance No. 1 (1 of 1972) with effect from 24.8.1972, vide Housing Department Notification No. 3051, dated 24.8.1972 with effect from 1.9.1972.

(3) Upon such constitution of Housing Board, the services of various employees of the Housing Department came to be placed at the disposal of Housing Board with effect from 1.9.1972, on the same conditions of service as were available and admissible to the then State Government servants.

(4) It was, however, specifically, clarified that the employees while serving the Board shall not be allowed any deputation allowance in addition to get the work continued, for their pensionary right and the pensionary benefits admissible under the Pension Rules of the State Government as amended from time to time.

(5) The services of the petitioner were to be placed at the disposal of the Housing Board, thus, on the conditions mentioned in the order dated 29.9.1972.

(6) The petitioner, as such, held the post of Correspondence Clerk when he was placed at the disposal of the Housing Board, which post later on came to be merged with that of the Upper Divisional Clerk giving effect from 1.5.1980.

(7) The Services of the petitioner came to be transferred to the respondent Housing Board in September, 1972, when he was holding the post of Correspondence Clerk only which post by virtue of merger became one with Upper Divisional Clerk with effect from 1.5.1980.

(8) It appears from the record that while serving the State Housing Board on deputation the original writ petitioner was given the higher post of Head Clerk and in the position he superannuated with effect from 31st January 1995.

(9) It would be interesting to mention that the relevant Bihar Pension Rules, 1950, came to be amended under resolution of the State Government being No. 3014, dated 31st July 1980, wherein, it has been specifically manifested and provided that the higher salary being paid to him on deputation shall not be taken into account for the purpose of calculating the pension with special reference to clause 5 (Ga) of the said resolution.

(10) Accordingly, the pension of the original petitioner came to be fixed by the State Government on 13.10.1995, on the basis of notional pay in the grade , of Upper Divisional Clerk, which he would have drawn on being continued in the Government service during the period of deputation with Housing Board as

during the said period the petitioner would have been paid salary in the said grade of Upper Divisional Clerk.

(11) The writ petitioner being not satisfied with the said order challenged the fixation of pension under order 13.10.1995 by a writ petition being CWJC No. 1993 of 1997 on 27.2.1997.

(12) The said writ petition came to be allowed under order dated 25.3.1998, holding that in Letters Patent Appeal No. 493 of 1997 this Court held that employees of the Housing Board would be entitled to pension on the basis of the salary last paid to them and drawn by them.

(13) It is the contention of the said appellant State of Bihar that the import of the amendment made in Bihar Pension Rules by virtue of the Government Resolution dated 31st July 1980 could not be considered which provides that pension of an employee retiring on deputation would be fixed on the basis of his notional pay which could be continued in the State Government's service on the date of his retirement.

(14) It is, also, borne out from the aforesaid factual profile that Division Bench decision dismissing the said Letters Patent Appeal and approving and affirming the order of learned Single Judge was further challenged and questioned in the highest Court of the land by filing a SLP (Civil No. 6825/1998) questioning the legality and validity of the order dated 12.1.1998 dismissing the Letters Patent Appeal No. 493 of 1997 by order dated 17.4.1998.

(15) It would be interesting at this stage to mention that the Hon'ble Apex Court while dismissing the said SLP has, also, categorically mentioned that the question of law will remain intact as no any opinion came to be expressed on the question of law involved by stating that in the facts arid circumstances of this case there is no justification to interfere with the impugned order of the Division Bench of this Court in the said Letters Patent Appeal. It means that it is very clear that the proposition of law enunciated in the petition and later on came to be affirmed by the Letters Patent Appeal Court was not gone into by the Hon'ble Apex Court in Special Leave Petition.

4. With the minor narration of the -factual profile, let us revert back to the appreciation of the merits of the point involved in the reference. The question which needs to be considered is as to whether in the fixity of pension on the last pay paid by the Government and the last pay drawn by the employee on a promoted post in the Housing Department upon transfer of services of such an employee from the Department of Housing to the Housing Board, the writ petitioner, successfully, questioned the order of the Government fixing his pension in terms of the Government Resolution, dated 31.7.1980.

5. It has been the case of the writ petitioner from the inception that fixity of pension would not be on the pay drawn by him on the substantive post before transfer of his services in the Department of Housing but it could be only on the

basis of the last pay drawn by him after his transfer even on a promoted post as it was then. This contention of the writ petitioner came to be accepted by the learned Single Judge. Upon questioning the said decision of the learned Single Judge before the Division Bench by way of Letters Patent Appeal by invocation of Clause 10 of the Letters Patent, at the time of hearing the attention of the Division Bench was drawn to two decisions as referred to hereinbefore. The reference necessitated on account of the observations made in Dina Nath Prasad's case (supra) with regard to the use of a circular against the statutory provision. It would, therefore, be expedient for us to examine and evaluate the propositions of law highlighted in the said two decisions in the light of the factual back drop in each case.

6. The whole basis of the case of Dina Nath Prasad (Supra) was against the action of the Master-Government in reducing the amount of pension under the provision of Bihar Pension Rules, 1950. In Dina Nath Prasad's case the Resolution of the State Government dated 31.7.1980 was sought to be used against the employee. It is in this context, the Division Bench while dealing with the merits of the case has observed that the Circular No. 3014, dated 31.7.1980 issued under the Bihar Pension Rules mandating to release the entire gratuity within six months of retirement limiting the provision of the statutory Rule provision would tantamount to subservient to the statutory Rule and it is in that context, it came to be adjudicated that the said circular cannot have any independent role to play. This decision is an evident pointer that the decision of the Government manifested in the circular or resolution as may be branded cannot be permitted "to abridge or limit or restrict the statutory provision incorporated in the Bihar Pension Rules. It is, therefore, very clear that the said decision does not in any way have the same stand now taken by the Government. There was no question of consideration of the merits of an issue of fixity of pension on the basis of last pay drawn on a promoted post as we have in the present case.

7. Even if it is considered from the point of ratio propounded in subsequent Division Bench rendered in Smt. Shiv Rani Devi and others (supra), the question was as to what should be the correct approach in fixing the pension pay whether it should be last pay drawn by the employee in the Housing Board, wherein, services of the employee have been transferred from the Housing Department of the State of Bihar and the employee stands promoted to the higher post and, also, incidentally, superannuates while being on a promoted post. It is in this context, clearly the Division Bench ruled that the Government servant on getting promotion on deputation in Housing Board and superannuating while holding the promoted post will be entitled to get his pension payable fixed on the basis of last pay drawn on the promoted post and even while working on deputation in terms of the provision of Rules 136 and 151 of the Bihar Pension Rules, 1950.

8. It appears from the short judgment that while affirming and approving the views and the ultimate conclusion reached by the learned Single Judge in the

writ petition raising the similar issue, the Division Bench has, inter alia, observed and relied upon one aspect that the pensioner-deceased employee was not shown to have earned his promotional post by playing a fraud upon the parent department and on deputation department considering the length of service.

9. Before we sum up and conclude our views, let there be a profile of celebrated propositions of service jurisprudence relevant and material to the issue in question in this reference :

A. The right of pension of an employee has been a property. It is not a grace of the Master or a windfall of the employee.

B. The consideration of fixity of pension involves various aspects including the qualifying period of service, as well as, the last pay drawn on a post.

C. The pension is nothing but an amount of compensation earned by the passage of time for the services rendered by the employee which has been neither an allurements nor an award but a right of an employee who has invested his sweat and blood in the growth of the Master's activities.

D. The proposition of right to pension is not a matter of recent past.

E. The decision of the Hon''ble Apex Court in the case of Deokinandan Prasad Vs. The State of Bihar and Others, is a milestone and a great guide on judicial adjudication of the highest Court and that too of Five Judges Constitution Bench of the Hon''ble Apex Court since 1971 which is holding the field down to ridge which, of course, came to be ameliorated and supplemented by subsequent decisions of the Hon''ble Apex Court.

10. The deputation implies a temporary permission by the Master of parent department to work outside the department or, in other words, to work outside the cadre on the ex-cadre post temporarily as, ordinarily, the deputation shall be for a tenure which is, also, clearly defined in the Pension Rules. It is a, temporary, or a stop gap arrangement to lend the services of an employee of the parent department to the loanee department. It could be even outside the department, outside the state or outside the country. This is so highlighted with a view to understand the underlying spirit of Government circular-resolution dated 31.7.1980 in a different context for consideration of a post not of a promoted one.

11. The very concept of promotion during the period of deputation would, ordinarily, imply consensually or by implication the severance of relationship of Master and servant between the parent department, from where the employee is transferred on deputation upon creation of the relationship, and the loanee department. It is only when on the last pay drawn in the parent department the right of promotion gives birth in the loanee department. This is not the situation in the case on hand.

12. The holding of temporary post outside the department on deputation and

without promotion perhaps the situation contemplated in the decision of the Government on 31.7.1980 may be useful.

13. Ordinarily, upon conclusion of the reference to the larger Bench or Full Bench, as the case may be, the matter reverts back for final decision of the case on merits on other aspects over and above the question referred in the reference. We would, also, require, ordinarily, to follow the same course. However, let it be mentioned that in a given exceptional situation with a view to do justice finally the larger Bench or the Full Bench, as the case may be, would, also, deal with finally more so in the present environment when there is unbreakable backlog of cases on hand which, also, involves expenses and a long spell of time in adjudication process.

14. Looking to the peculiar facts and circumstances emerging from the present case and consensually, also, we deem it very expedient to put a lid on the lis as the dispute is travelling in the long legal conduit pipes since years together and it is unfortunate that we did not decide this matter since 1998. It is in this context, upon consideration of the facts and circumstances coupled with the facts and the proposition of law rendered in Dina Nath Prasad's case (supra) which has become final as it was never questioned before the Hon'ble Supreme Court, as stated at the Bar by counsel for the appellant State, it appears from the examination of the entire decision dispassionately that the main point in focus in the case had been related to the consideration of the deduction and reduction of the amount of gratuity of an employee and there is a consensus that the question of consideration of the pension and that too of a person or an employee on deputation superannuating on a promoted post there and then, was not at all under consideration. Therefore, it operates in a different field.

15. Whereas, the decision of this Court in the case of Smt. Shiv Rani Devi (supra) has, also, become final in the light of the facts and circumstances of that case in absence of sufficient materials on the following aspects :

(i) The legal status upon the creation of the Housing Board in 1972 from the Housing Department of the State of Bihar.

(ii) "En bloc" required transfer of the employees of the Housing Department to the Housing Board on its creation in 1972 including the .transfer of the original writ petitioner since the inception and other incidental and ancillary material.

(iii) The impugned order of fixation of pension of the original writ petitioner is of 1995 and since then more than a decade has elapsed. It is in these circumstances we have thought it expedient to deal with and decide this Letters Patent Appeal in this reference finally.

16. We have no hesitation in finding that the impugned order of fixity of pension dated 13.10.1995, merely keeping in mind the contents of the Government circular or resolution dated 31.7.1980, does not, in our correct appreciation and intensive evaluation thereof indicate to deal with a situation as we have in the

present Letters Patent Appeal. Therefore, while quashing the impugned order of fixity of pension dated 13.10.1995, we direct the appellant State to consider the case of the original writ petitioner for fixation of the pension and pensionary benefits in the light of last pay drawn in terms of the provision of the Bihar Pension Rules, 1950 within one month.

17. However, at this stage, learned counsel appearing for the original writ petitioner, respondent herein, states at the Bar that pursuant to the direction of the judgment of the learned Single Judge, which is under challenge in this Letters Patent Appeal, the appellant State has, already passed an order modifying the earlier order of pension in consonance with the provision of Bihar Pension Rules, 1950, It is, therefore, he has further submitted that since the said order has been passed since more than a decade, it would be in the larger interest of justice to award interest on the belated payment of pension on difference amount between the amount payable under the impugned order of pension which is quashed by this order and the amount payable in terms of the Rule provision of the Bihar Pension Rules, 1950. In the light of the celebrated proposition of law apart from the Rule provision we allow an interest at the rate of 10 per cent per annum from the date on which the earlier order of pension was passed, i.e., 13.10.1995 till the date of full payment in terms of this judgment on the difference amount, as well as, on the delayed payment of the amount of gratuity. The reference shall stand answered and decided accordingly. The Letters Patent Appeal shall stand dismissed with costs which is quantified at Rs. 5000/- (five thousand).