(2006) 05 JH CK 0127

In the Jharkhand High Court

State of Jharkhand and Others APPELLANT

Vs

Baleshwar Singh and Another RESPONDENT

Date of Decision : 11-05-2006

Acts Referred:

Citation : (2006) 4 JCR 660

Hon'ble Judges : S.J. Mukhopadhaya, J;Permod Kohli, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This application has been preferred by the State of Jharkhand against the judgment dated 21st June, 2005. passed by the learned Single Judge in WP (S) No. 6717 of 2004, whereby and whereunder, the learned Single Judge while set aside Office Order No. 195/2004. communicated vide Memo No. 669, dated 26th May, 2004, held that the respondents cannot recover any amount from the petitioner''s gratuity and thereby, directed to refund the amount, already recovered, with statutory interest and on failure, to pay compensatory interest at the rate of 10% per annum.

2. The question, requires to be determined in this case, is whether the amount, if any, paid in excess, due to calculation mistake, can be recovered from pension or gratuity of a Government employee?

If the aforesaid question is answered in affirmative and in favour of the State, then the following question will arise (a) who is the competent authority to recover/adjust such amount? (b) what will be the procedure to recover/adjust such amount? and (c) whether there is any period of limitation to recover such dues?

3. Brief facts of the case are that the appellant joined the services of the then State of Bihar as Constable (O), wireless, on 16th August, 1969 and promoted to the higher post of Assistant Sub-Inspector of Police in the year, 1974 and then to the next higher post of Sub-Inspector of Police with effect from 1st August,

1992. His service was placed under the State of Jharkhand in the year, 2001 (after reorganisation of the State) and on attaining the age of 58 years, he superannuated on 29th February, 2004.

4. After retirement, the 4th respondents, Superintendent of Police (Arms), Jharkhand, Ranchi, issued impugned Office Order No. 195/2004, circulated vide Memo No. 669 dated 26th May, 2004 and ordered to recover a sum of Rs. 88,893/-from the gratuity of the appellant, denying/disapproving the reducible personal pay, which was paid to him during his service period, on the basis of fixation of pay, made by the department. The respondents also reduced his pension on the plea of the said impugned order and fixed his monthly amount of pension at a reduced rate of Rs. 8300/- per month.

5. Learned Single Judge having noticed the rival submissions and taking into consideration the order of promotion of the appellant and the fact that his pay was fixed by the department, held that there was no misrepresentation on the part of the appellant and giving reference to one or other decision of this Court and the Supreme Court, set aside the impugned Office order No. 195/2004, circulated vide Memo No. 669. dated 26th May, 2004. The said order was held to be arbitrary and illegal and the respondents were directed to refund the amount, deducted from the appellant''s gratuity, with statutory interest within four months and, on failure, compensatory interest was also imposed.

6. Learned Government Advocate, supporting the impugned order, submitted that an order of wrong fixation of pay can not create any right in favour of the appellant and the payment, made by mistake or illegally, can be recovered from pension and/or gratuity, he relied on the decisions of this Court and Supreme Court, as discussed hereunder:

In the case of Union of India v. Sujatha Veda Chalam reported in AIR 2000 SC 2709 , the request by an employee for transfer was accepted on the condition that the employee should technically resign from the post, which he was holding and should join as direct recruit to lower post on transfer. The Supreme Court held that the employee having accepted the condition of transfer is entitled to pay scale as applicable to the lower post. The order for recovery of excess pay, which was recently paid to the employee, was held to be illegal.

In the case of Union of India v. Rakesh Kumar reported in (2001) 4 SCC 301 the Supreme Court noticed that the departmental authority on a wrong interpretation of rule granted pensionary benefits to an ineligible employee. On that basis, the High Court directed the department to release his pension. In the said case, the Supreme Court held that the grant of relief, contrary to the statutory rule, is not permissible.

In the case of State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, , a Division Bench of this Court having noticed that the State Government sought to make recovery from retiral benefits, pursuant to cancellation of 2nd time bound promotion, held that there cannot be any estoppel against seeking to recovery in case of unauthorised payment made to an un derserving person. The fact that some one had made an error in giving a time bound promotion to the writ petition of the said case, as per Division Bench of this Court, if it was not due, the same would not cloth the said petitioner with any such right. The decisions, rendered in the case of State of Jharkhand and Others Vs. (Smt.) Girish Kumari Prasad and Others, was followed by this Court in the case of Rameshwar Prasad Vs. Jharkhand State Electricity Board and Others, .

7. The then State of Bihar issued a guideline vide Finance Department''s Resolution No. 3014B, dated 31st July, 1980, simplifying the procedure for payment of pension and gratuity. Under Clause 6 while guideline was issued relating to administrative sanction and approval of pension, Clause 7 deals with withholding the pension or recovery of pension under Rule 43(b) of the Bihar Pension Rules, 1950. While Clause 8 deals with payment of provisional pension/ gratuity, Clause 10 deals with adjustment of dues.

Sub-clause (ka) of Clause 10 relates to adjustment of House Rent dues whereas Sub-clause (kha) to Clause 10 deals with adjustment of other dues, except House Rent, Sub-clause (kha) of Clause 10 of the said guideline is quoted hereunder:

[k vkokl dks NksM+dj vU; izdkj ds lHkh cdk;k&lsok fuo`?k dh frfFk ds nks o"kZ iwoZ tc isa?ku dkxtkr rS;kj djus ds fy, izfdz;k izkjaHk dh tk; mlh le; ls vU; ljdkjh cdk;s dk ewY;kadu Hkh izkjEHk dj fn;k tk; D;ksafd ,d o"kZ pkj ekg ds rqjar ckn okLrfod isa?ku dkxtkr rS;kj djus dh izfdz;k izkjEHk gks tkrh gS vkSj lHkh ljdkjh cdk;s dk ewY;kdau djus dk vYi le; jg tkrk gSA lsok&fuo`f?k dh frfFk ds nks o"kZ iwoZ ls vf/kd vof/k dk dnkfpr ughaA bl izdkj dk;kZy; iz/kku ;k isa?ku Hkqxrku vkns?k fuxZr djus ls lEcfU/kr dk;kZy; ?egkys[kkdkj? dks isa?ku@minku Hkqxrku vkns?k fuxZr djus ds fu/kkZfjr vof/k ds iwoZ cdk;s jkf?k fo?ks"k dj yEcs ?krksZa ij Lohd`r vfxze tSls x`g&fuekZ.k ;k lokjh (Conveyance Allowance) vfxze osru rFkk Hk?kk dk vf/kd Hkqxrku dh jkf?k rFkk vU; cdk;k dk irk yxkus esa lqfo/kk gksxhA isa?ku dkxtkr es e`R;q&lg&lsok fuo`f?k minku ;k vkSicaf/kd isa?ku@minku ls olwy djus dh lEiw.kZ jkf?k dk Li"V :I ls mYys[k djuk gSA vxj isa?ku dkxtkr egkys[kkdkj ds ikl Hkqxrku vkns?k fuxZr djrs gq, Hkst fn;s x;s gS vkSj ckn esa ljdkjh cdk;s dk irk pys rks mldh lwpuk mUgsa ?egkys[kkdkj dks? fuf?pr :i ls vfoyEc ns nsuk gksxkA ftu ekeys esa c`gr~ cdk;s dh olwyh gsrq ;k vfUre Hkqxrku izek.k&i= fuxZr ugha gksus dh fLFkfr esa minku ds 10 izfr?kr ;k 1]000 :? jksdh x;h jkf?k lsok&fuo`fk ds 6 ekg ckn Lor% Hkqxrku dj fn;k tk;sxkA vkSicaf/kd minku Hkqxrku vknsk esa ;k ;k vfUre minku Hkqxrku vkns?k esa dk;kZy; iz/kku ;k egkys[kkdkj] fcgkj }kjk jksdh x;h jkfk dk Li"V mYys[k bl krZ ds lkFk dj nsuk gksxk fd vxj 6 ekg ds vUnj esa jksdh x;h jkf?k dks vkxs le; rd jksd j[kus dh dksbZ lwpuk ugha feys rks O;;u inkf/kdkjh lEcfU/kr deZpkjh dks Lor% dj nsaxsA lkFk&lkFk isa?kuj dh lwpuk izfr esa Hkh bldk Li"V mYys[k gksxkA

8. From the aforesaid decisions, rendered by this Court, Supreme Court and the guidelines, issued by the then State of Bihar, which is also applicable in the State of Jharkhand, while it will be evident that the State Government has jurisdiction

to recover its dues from the pension and gratuity of a retired employee, the Slate Government has fixed the period to make such calculation and is prohibited to do so in regard to the period two years prior to retirement. The exact sentence used by the State Government is lsok&fuo`f?k dh frfFk ds vkB ekg iwoZ tSls gh og izdze vk tkrk gS rks cdk;s dh ys[kk&tks[kk ds fy, lhfer vof/k ds vfHkys[kksa dh tkap dh tk; vFkkZr~ lsok&fuo`f?k dh frfFk ds nks o"kZ iwoZ ls vf/kd vof/k dk dnkfpr ughaA.

The main issue, raised in this case, is answered accordingly.

9. Now the next question arises as to how such recovery can be made from the retiral benefits; who can recover the amount; through which procedure recovery can be made and the limitation, if any, to recover such amount.

10. This issue has not been determined either by this Court in the case of Smt. Girish Kumari Prasad, (supra) nor by the Supreme Court in the case of Union of India v. Rakesh Kumar, (supra) or the cases, as referred by the parties.

11. The power to recover any amount from pension or gratuity or to reduce pension is envisaged under Rule 43(b) and Rule 139 of the Bihar Pension Rules, 1950 respectively, which reads as follows:

43. (a) xx xx xx xx (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 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 of 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 while 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 places 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.

xx xx xx xx 139. la) The full pension admission under the rules is not to be given as a matter of course, or unless the service rendered has been really approved.

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

(c) The State Government reserve to themselves 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. No such power shall however, 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, or any such power shall be exercised after the expiry of three years from the date of the order sanctioning the pension was first passed.

12. Rule 226 prohibits attachment of pension, which includes gratuity, by a Civil Court in view of Section 11 of Act XXIII of 1871. Thus, it will be evident that except in the manner, as prescribed under the aforesaid Rules, the State cannot recover the pension and gratuity of its own without following a prescribed procedure.

13. The State can recover the amount by filing a suit before a Civil Court of competent jurisdiction or in appropriate case, may file certificate case but in both cases, law of limitation being applicable, it is not open to the State to recover any amount at any time from pension or gratuity in the name of adjustment, that too without giving opportunity to the retired employee. Before recovery or adjustment of any amount from the pension or gratuity in the case of mistaken calculation or payment in excess, the retired employee should be given an opportunity of hearing to state as to why the amount be not recovered/adjusted from his pension/gratuity and it will be open to the retired employee to show that such recovery or adjustment is uncalled-for or is barred by limitation. However, such procedure will not be applicable in cases where any recovery or adjustment is made from pension or gratuity in terms with Rule 43(b) or Rule 139 of the Bihar Pension Rules, 1950, where a specific procedure has already been

prescribed.

14. It will be evident that the competent authority, which is empowered to sanction pension, can reduce pension under Rule 139 for the grounds, as prescribed under the Rule. If a departmental proceeding is not initiated by the competent authority while the Government employee was in service, after retirement it is only the Slate Government, which is empowered to initiate such proceeding under Rule 43(b) of the Bihar Pension Rules, 1950, subject to limitation of four years from the date of occurrence/first cause of action. If the power is vested with the State Government to make recovery under Rule 4(b) and such proceeding is subject to prescribed period of limitation, then how such recovery or adjustment can be made by any other authority, if not authorized by the State.

15. For example, if a person by misrepresentation or duping the State Government draws excess amount of salary or other benefit, such action being misconduct, after retirement it can be recovered only under Rule 43(b) of the Bihar Pension Rules, 1950. If charge is not framed while the employee is in service, after retirement it is only the State Government, empowered to do so and not any other officer and there is a limitation of four years, prescribed under the Rule. On the other hand, if an employee, who is honest, is paid excess amount, not because of misrepresentation but because of mistake on the part of the other person, after retirement how such amount can be recovered or adjusted by any authority, not empowered to do so. except by the order of the State and can the period of limitation be ignored in such cases?

16. If these type of cases when excess payment is made to a Government employee by mistake and such mistake is committed by some other person, one can not ignore Rule 43(b) in such cases. It is not that only in I he case of misconduct Rule 43(b) can be invoked but it can also be invoked against an employee, if there is a pecuniary loss, caused to the Government due to negligence of the employee. That means the employee due to whose negligence such amount was paid to another employee and such negligence caused pecuniary loss to the State Government, then why the State Government will not recover the amount by invoking the provisions of Rule 43(b) against the person, due to whose negligence pecuniary loss was caused to the State Government.

17. In the present case, it has not been made clear as to why no such action was taken under Rule 43(b) or any other Rule against the persons, due to whose negligence excess amount was paid to the petitioner and that caused pecuniary loss to the Government. If such negligent employee is already in service, then it could have been recovered by initiating a departmental proceeding for negligence of duty.

18. It has been noticed in this case that the State Government has not taken any decision to recover or adjust any amount from the pension or gratuity of the writ petitioner-1st respondent. There is nothing on the record to suggest that any

opportunity was given to the writ petitioner-1st respondent, asking him to show cause why the excess payment made due to mistake be not recovered from his pension or gratuity. If such opportunity would have been given, the retired employee could have shown that such recovery or adjustment was not permissible or was not called for. Further, the period during which such mistake was committed having not been mentioned, the retired employee will not be in a position to point out whether such recovery or adjustment is barred by limitation.

19. In view of the aforesaid findings, we hold that the respondent-Superintendent of Police (Wireless), Jharkhand, Ranchi (Pay Fixation Section) had no jurisdiction to order for recovery of a sum of Rs. 88,893/- from the gratuity of the writ petitioner1st respondent and the impugned officer order No. 195/2004, circulated vide Memo No. 669, dated 26th May, 2004 having been passed in violation of the rules of natural justice, cannot be upheld.

20. For the reasons, as recorded above, it is not necessary to discuss whether the grounds shown by the learned Single Judge is proper or not; we do not want to disturb the order, passed by the learned Single Judge.

21. There being no merit, this appeal is hereby dismissed. However, there will be no order as to costs.