

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6478 of 2018

Param Hans Kumar Singh Son of Late Surendra Singh, Resident of Village-
Bikrampur, P.S.-Fatuha, District-Patna.

... .. Petitioner/s

Versus

1. The State Of Bihar through Commissioner Commercial, Taxes cum
Principal Secretary, Commercial Taxes Department, Government of Bihar,
Patna.
2. The Accountant General, of Bihar, Patna.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Santosh Kumar Sinha No.2, Advocate.

: Mr. Arvind Prasad Singh, Advocate.

For the Accountant General : Mr. Vivekanand Kumar, Advocate.

For the Respondent/s : Mr. Hari Shankar Rai, AC to AG.

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 17-11-2022

Heard Mr. Santosh Kumar Sinha No.2, learned counsel
for the petitioner duly assisted by learned counsel Mr. Arvind
Prasad Singh, Mr. Vivekanand Kumar, learned counsel for the
respondent Accountant General and Mr. Hari Shankar Rai, learned
Assistant Counsel to Advocate General for the State.

2. The present writ application has been filed seeking
direction upon the respondents to ensure payment of post retiral
dues, including gratuity, leave encashment with statutory interest
and other benefits, which has been withheld by the order issued by



the Commissioner Commercial Taxes cum Principal Secretary, Commercial Taxes Department, Government of Bihar, Patna, as contained in letter no.6/PE U 14-15/2012, 670, dated 01.03.2013.

3. The short facts in narrow compass is that the petitioner joined the service on 12.09.1984, on the post of Commercial Taxes Officer in the office of Joint Commissioner Commercial Taxes, Patna Division, Patna. After completion of probation, he was posted in Urban Circle Officer, Jamshedpur, on the post of Commercial Taxes Officer. It is further submitted that somehow or other on account of certain allegation, the petitioner was charged in the Fodder Scam bearing Case No. RC63A/96 (Pat). During the pendency of the aforesaid criminal case, the petitioner retired from his service on 31.12.2012 from the office of the Joint Commissioner, Commercial Taxes (Audit) Patna.

4. Learned counsel for the petitioner submits that after his superannuation, the petitioner has submitted requisite documents before the authority concerned for grant of his retiral benefits, however, the petitioner has been allowed only pension to the extent of 90 per cent and neither amount of the gratuity nor the leave encashment has been



bestowed upon him. He further submits that by the order of the Commissioner Commercial Taxes cum Principal Secretary, dated 01.03.2013, the claim of the petitioner was considered and having found that the prosecution has been sanctioned against the petitioner in Fodder Scam, which has not been disposed of till date, the amount of gratuity has been withheld and he has been allowed only 90 per cent of pension in the light of the resolution no.3014 dated 31.07.1980, issued by the Finance Department. He also submits that after the retirement of the petitioner the amount under head of leave encashment was sanctioned, but the same has also not been paid to the petitioner.

5. On the other hand, learned counsel for the State by referring to the averments made in the counter affidavit submits that in exercise of the power conferred in Article 309 of the Constitution of India, the amendment has taken place in Bihar Pension Rules 1950 by amending Rule 43 (d) which clearly empowers the State Government that “if any departmental or Judicial Proceeding is pending against the government servant at the time of retirement, full amount of gratuity may be with held till the final conclusion of the



Departmental or Judicial Proceeding and issuance of order accordingly.

Provided that where departmental proceedings has been instituted under Rule 19 of Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (As amended time to time) for imposing minor penalties under Rule 14 (i) (ii) and (v) of the said rules, payment of gratuity may be made to the government servant.”

6. He next submits that there is no prayer for quashing of the impugned order dated 01.03.2013 and in absence of such prayer no relief can be granted to the petitioner. He also submits that the criminal case is still subjudice and there is every possibility that the learned Competent Court may pass order of recovery against the petitioner, inasmuch as the petitioner is an accused of “Animal Husbandry Scam” and in such circumstances order passed by the Commissioner Commercial Taxes cum Principal Secretary, Commercial Department, Government of Bihar, has been passed in accordance with law.

7. The issue involved in the present matter has already been set at rest by the judgment rendered by the learned Full Bench of this Court in the case of **Arvind**



Kumar Singh Vs. State of Bihar since reported in **2018 (2)**

PLJR 933, it would be apt to quote Paragraph nos. 25 to 29

which is as follows:-

“25. When this amendment was incorporated on 19th of July, 2012, the State Government was aware of the earlier statutory circular dated 31st of July, 1980 and the administrative circulars of 1974, but while incorporating a provision in the rule itself by amending it, i.e. Rule 43(c), the rule maker consciously used the word “pension” only without carving out an exception with regard to withholding of gratuity. The omission of the word “gratuity” in the amended provisions of Rule 43(c), in our considered view, is a deliberate and conscious omission on the part of the rule maker. The rule maker knew that pension includes gratuity and when they speak about payment of provisional pension, the rule of interpretation mandates us to hold that it would mean payment of not only provisional pension but also gratuity until and unless the rule specifically provides for withholding of gratuity. That being so, once Rule 43(c) was incorporated into the statute and when Rule 43(c) does not empower the Government to withhold gratuity and when gratuity includes pension, in view of the provisions of Rule 27, the contention of the State Government and the learned Advocate General cannot be accepted. We have to hold that once Rule 43(c) was incorporated in the statutory rule, the effect of the earlier statutory notification dated 30th of July, 1980 is wiped out, nullified or deemed to have been repealed. Incorporation of Rule 43(c) on 19th of July, 2012 will have the effect of annulling the earlier notification dated 30th of July, 1980 or the circulars of 1974 and therefore, once a statutory



provision-Rule 43(c) is incorporated in the rule itself, it has to be given its full and complete meaning, by adopting a literal meaning to each and every word used therein, and if this principle of statutory interpretation is followed, the contention of the State Government has to be rejected and we have no hesitation in holding that after coming into force of the amendment to the Pension Rules by incorporating Rule 43(c) on 19th of July, 2012, an employee who is facing departmental inquiry or judicial proceeding on the date of his superannuation would be entitled to provisional pension which would include gratuity to the tune of an amount not less than 90 per cent.

26. Having held so, with regard to pension and gratuity, we are now required to consider the next question pertaining to grant of leave encashment to a retired employee.

27. As far as leave encashment is concerned, we find that there is no statutory provision, rule or regulation providing for encashment of Earned Leave. During the course of hearing, we had asked specific questions to the counsel appearing in the matters and we were informed that there is no statutory rule governing grant of leave encashment. It was stated that it is based on executive instructions and the statutory provision is only for granting Earned Leave to a Government employee.

28. The Bihar Service Code, Chapter-VI deals with general conditions of leave and from Rule 149 onwards, provisions have been made for grant of various kinds of leave like Casual Leave, Special Leave, Medical Leave, Extraordinary Leave, Hospital Leave etc. and under this Chapter from Rule 227 onwards provisions have been made for grant of Earned Leave. Under Rule 227 (1) it is stipulated that the Earned Leave admissible to a Government servant in permanent employment shall be



in accordance to Clause (a) and (b) stipulated therein and under sub-section 2 it is contemplated that a Government servant shall cease to earn such leave when the Earned Leave due to him has reached a particular level. The method and principle for calculating Earned Leave etc. are provided in the Rule. Nowhere in this rule is there a provision for permitting leave encashment. It is for the first time by an executive instruction bearing No. 4564 dated 6th of July, 1993, that a provision has been made for encashment of unused Earned Leave after retirement and in this circular in Paragraph 2 the following stipulations have been made:—

“2.उपर्युक्त संदर्भ में अद्योहस्ताक्षरी को पुनः यह

स्पष्ट करने का निर्देश हुआ है कि छुट्टी स्वीकृत करने के लिए सक्षम पदाधिकारी स्वविवेक से सम्पूर्ण नगद राशि अथवा उसके निश्चित अंश के भुगतान को जैसे मामले में रोक सकते हैं, जिसमें सेवा-निवृत्त कर्मचारी के विरुद्ध सेवा-निवृत्ति की तिथि तक किसी भी तरह की विभागीय कार्यवाही, फौजदारी मुकदमा अथवा न्यायिक जाँच का अन्तिम निष्पादन नहीं हो पाया हो और जिसमें जाँच के फलाफल के रूप में वसूली की क्षीण संभावना भी विद्यमान हों। जाँच के अन्तिम निष्पादन होने पर रोके गये भुगतान को विमुक्त कर दिया जायेगा। परन्तु जाँच के परिणाम स्वरूप यदि कोई वसूली करने का निर्णय हो, तो वसूली करने के बाद ही शेष राशि विमुक्त की जायेगी।” (Emphasis supplied)

29. From the aforesaid, it is clear that as far as leave encashment is concerned, leave encashment is not provided for in the Pension Rule. Under the Bihar Service Code, a provision has been made for grant of Earned Leave and by an executive instruction issued on 6th of July, 1993, a provision is made for encashment of Earned Leave and while making the said provision a condition is stipulated that an employee shall not be granted encashment of Earned Leave till finalization of



the departmental inquiry or the judicial proceeding. When the terms and conditions with regard to encashment of leave is not governed by any statutory provision and when the same is granted by an executive or administrative decision of the State Government so long as the administrative decision to withhold encashment of Earned Leave subsists, then on the happening of such circumstances, as are contemplated, we see no reason to hold that leave encashment can be granted even in cases where the employee at the time of retirement is facing departmental or judicial proceeding. The law laid down in this regard in the cases referred to hereinabove do not consider this aspect of the matter, all the cases proceeded under the mistaken assumption that the leave encashment is provided for in the Pension Rules, and, therefore, we have no hesitation in holding that when an employee is facing a criminal case or a departmental proceeding, at the time of his retirement, the Government is well within its power in withholding leave encashment.”

8. This court is conscious of the fact that the petitioner superannuated on 31.12.2012 and prior to his superannuation the Rule 43 (c) was incorporated in the Bihar Pension Rule on 19.07.2012, which reads as follows :-

“43(c) Where the departmental proceeding or judicial proceeding, in which the prosecution has been sanctioned against such servant, initiated during the service period of the government servant, is not concluded till the retirement of the government servant, the amount of provisional pension shall be less than the maximum admissible amount of pension but shall in no case be less than 90% (ninety percent).”



9. It would also to be apt and proper to quote the relevant paragraph nos.20 to 28 & 33 of the judgment rendered by learned Co-ordinate Bench of this court, while dealing with the similar issue, *inter alia*, regarding the issue of retrospective application of rule 43 (d) of the Bihar Pension Rules, in the case of **Dr. Aquil Ahmad Vs. State of Bihar**, since reported in **2021 (1) PLJR 293**, held as follows:-

“20. To come out of the rigorous of the Full Bench judgment of this Court the amendments were brought by substituting Rule 27 and then by inserting one sub-Rule (d) after Rule 43(c) of the Bihar Pension Rules. In these circumstances now the question arises as to whether the substituted provision of Rule 27 and newly inserted Rule 43(d) of the Bihar Pension Rules vide Memo No. 77 dated 21.01.2019 may be applied with a retrospective effect so as to deprive the petitioner from getting his admissible gratuity amount. This Court has already quoted the Memo No. 77 dated 21.01.2019 in the preceding paragraphs.

21. While dealing with the right of a retired employee to get his gratuity amount this Court would be required to take into consideration the relevant provisions of the Gratuity Act 1972. The background of the coming into force of the payment of gratuity Act was the fact that prior to this enactment the different States were having different enactment with respect to the payment of gratuity to the employees. It was thought necessary to have a central law on this subject so as to ensure an uniform pattern of payment of gratuity to the employees throughout the Country and it was also required to avoid different treatment to the employees of the establishments



having branches in more than one State. The Statement of Objects and Reasons behind enactment of the Payment of Gratuity Act, 1972 may be referred to in this regard. According to Section '4' of the Payment of Gratuity Act the gratuity shall be payable to an employee on the termination of his employment after he has rendered continuance service for not less than five years and one of the modes of termination of the employment is his superannuation from service. Under Section 4(6) employer has power to forfeit gratuity payable to an employee in certain circumstances. Section 4(6) of the Act of 1972 reads as under:—

“4(6) Notwithstanding anything contained in sub-section (i),—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited].

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part; or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

27. So far as the retrospective applicability of a provision contained in a Statute is concerned, again it is well settled law that the provisions which are brought by way of an amendment which will have an effect of depriving a person from getting his vested rights and



taking away the benefits such as post retiral dues cannot be given a retrospective effect unless it is so provided specifically in the Statute/Rule or by necessary intendment.

28. On the issue of retrospective applicability of a statute or statutory provision touching upon the existing rights Lord Blanesburg while delivering the opinion of the Privy Council in the case of Delhi Cloth & General Mills Ltd. v. C.I.T., Delhi reported in AIR 1927 PC 242 observed "Provisions, which, if applied retrospectively, would deprive of their existing finality or orders, which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided".

33. Thus, considering the provisions of the payment of Gratuity Act, the judgment of Hon'ble Full Bench of this Court in the case of Arvind Kumar Singh (supra) and that of Hon'ble Supreme Court in Dr. Hira Lal's case as also the fact that the amendment in Rule 27 by way of substitution and then by inserting a new provision such as sub-rule (d) of Rule 43 in the Bihar Pension Rules 1950 have come into force w.e.f. 21.01.2019 the respondents cannot apply those provisions with a retrospective effect so as to take away the vested right of the petitioner to receive his gratuity amount in terms of the settled law in the case of Arvind Kumar Singh (supra). Any judgment of this Court cannot be negated by bringing a legislation much less by way of a rule framed under Article 309 of the Constitution by applying the same with retrospective effect. Such amendment will only be prospective in nature. Judgment of the Hon'ble Supreme Court in Madan Mohan Pathak v.



Union of India reported in (1978) 2 SCC 50 : AIR 1978 SC 803 is an authority on this point. Taking recourse to the amendments the petitioner cannot be deprived of his vested right to receive the gratuity amount in terms of the law laid down by Hon'ble Full Bench in Arvind Kumar Singh (supra) which has been virtually approved by Hon'ble Supreme Court in the case of Dr. Heera Lal (supra)."

10. In view of the aforesaid factual and settled legal position, the order dated 04.03.2013 as contained in Annexure-I, passed by the Commissioner Commercial Taxes cum Principal Secretary, Commercial Department, Government of Bihar, Patna, is held to be unjustified improper and not sustainable in law. The Commissioner Commercial Taxes cum Principal Secretary, Commercial Department, Government of Bihar, Patna, is hereby directed to consider the case of the petitioner afresh for grant of his due retiral benefits, including, gratuity and leave encashment in the light of the aforesaid judgment rendered by the learned Full Bench and Co-ordinate Bench of this Court, as discussed hereinabove.

11. It is needless to say that the entire exercise must be completed within a period of six weeks from the date of receipt/production of this order. If the claim of the petitioner



finds favour, necessary order for payment must be passed within the aforesaid period.

12. Accordingly, the present writ application stands allowed with the aforesaid observation and direction.

(Harish Kumar, J)

manoj/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21.11.2022.
Transmission Date	NA

