

IN THE HIGH COURT OF JHARKHAND AT RANCHI**Writ Petition (Service) No. 3960 of 2019**

Hari Prasad Das, aged about 71 years, son of Late Makko Das, Resident of Surajlok Colony, Bagwari, P.O. Mirzanhat, P.S. Babarganj, District-Bhagalpur, Bihar

... **Petitioner**

-Versus-

1. The State of Jharkhand
2. The Secretary, Water Resources Department, Government of Jharkhand, having its office at Nepal House, Doranda, P.O. & P.S. Doranda, District-Ranchi
3. The Joint Secretary, Water Resources Department, Government of Jharkhand, having its office at Nepal House, Doranda, P.O. & P.S. Doranda, District- Ranchi
4. The Engineer-in-Chief, Water Resources Department, Government of Jharkhand, having its office at Nepal House, Doranda, P.O. & P.S. Doranda, District- Ranchi

... **Respondents**

PRESENT

HON'BLE MR. JUSTICE SANJAY KUMAR DWIVEDI

For the Petitioner : Mr. V.N. Jha, Advocate
For the Respondent-State : Mr. Anshuman Kumar, A.C. to Sr. S.C.-II

C.A.V. on 02/07/2020

Pronounced on 07/07/2020

- 1.** Heard Mr. V.N. Jha, learned counsel for the petitioner and Mr. Anshuman Kumar, learned counsel for the respondent-State.
- 2.** This writ petition has been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation arising due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter has been heard on merit.
- 3.** The petitioner has preferred this writ petition for quashing the order dated 16.04.2019 contained in Annexure-9 to the writ petition, whereby, direction has been issued under the signature of respondent no.3 to deduct 5% pension for five years in view of the departmental proceeding initiated against the petitioner.

4. The case of the petitioner is that he was posted as Chief Engineer under the respondents at Deoghar. Thereafter, he was transferred from Deoghar to Ranchi on 22.11.2005. The then Chief Engineer has inspected Narayanpur-Bikrampur-Sangrampur Tatband, which was found to be broken on 11.07.2006. The Inspection Report has been sent by the then Chief Engineer on 18.07.2006 contained in Annexure-1. After submission of Inspection Report of Chief Engineer, the Deputy Secretary of the Water Resources Department has issued a show-cause notice to the petitioner on 19.08.2006 contained in Annexure-2. The petitioner has submitted a detailed explanation/reply to the above show-cause notice on 28.08.2006 contained in Annexure-3. Thereafter, a charge-sheet dated 12.11.2008 was issued to the petitioner for the alleged lapse, which was happened on 11.07.2006. The petitioner retired from the service on 31.01.2008. The charge-sheet has been issued on 12.11.2008 after lapse of 4 years of event. The petitioner submitted a detailed written statement of defence against the charges on 02.12.2008 to the conducting officer. The petitioner was transferred from Deoghar on 22.11.2005 and his successor took the charge from him, so it was the duty of successor to ensure maintenance of Narayanpur-Bikrampur-Sangrampur embankment. The Enquiry Officer did not find any charge as alleged against the petitioner in Form-K and submitted his report to the competent authority on 30.04.2009 with recommendation to exonerate the petitioner from all the alleged charges, which is contained in Annexure-6 to the writ petition. The Presenting Officer did not examine any witness before the Conducting Officer to support charges against the petitioner nor opportunity was provided to the petitioner to cross-examine the person who has submitted the Inspection Report. In the second show-cause notice dated 04.08.2017, no proposed punishment was suggested. The petitioner filed detailed explanation/reply to the said second

show-cause notice on 20.09.2017 and 05.10.2017 contained in Annexure-8. By order dated 16.04.2019, direction was issued to deduct 5% from pension of the petitioner for 5 years after lapse of 14 years of the event. The said order has been passed against the retired employee, who retired on 31.01.2008. The Engineer-in-Chief has also inspected the said Sangrampur-Narayanpur embankment on 02.06.2005 and he directed the Executive Engineer and Superintending Engineer to hold the camp on the said embankment and do all efforts for safety of the said embankment. The petitioner has continuously sent a series of letters with regard to current status of embankment and for necessary direction, as contained in Annexure-12 Series. Aggrieved with the impugned action of 5% deduction of pension of the petitioner for 5 years by the respondents, the petitioner has preferred this writ petition. The petitioner is getting pension since 2008 and after lapse of 11 years, the order of deduction has been passed against the petitioner.

5. Per contra, the case of the respondent-State is that at that time, the petitioner was posted as Chief Engineer, Deoghar and he was responsible for getting the reconstruction work of Narayanpur-Bikrampur-Sangrampur embankment, which was done under his supervision. The said work was commenced in March 2005 and at the time of initiation of work, the petitioner was posted there. The complaint with regard to irregularities in the said construction work was received by the departmental authority and, thereafter, spot enquiry was made. A departmental inspecting team headed by the Engineer-in-Chief, Water Resource Department, Government of Jharkhand was sent for on spot enquiry and inspection of the work. The said team submitted its report on 04.06.2005. The Engineer-in-Chief has pointed out several discrepancies. The petitioner was directed to get the work done in his presence and further ensure

that the work must be completed as per approved design within time. The daily progress report was also sought from the petitioner. On 11.07.2006, the said embankment was collapsed, which was reconstructed under the supervision of the petitioner. The then Chief Engineer conducted an on spot enquiry and submitted his report on 18.07.2006. The reasons for collapsing the embankment was similar to the discrepancies as pointed out by the then Engineer-in-Chief in his report dated 04.06.2005. Thereafter, show-cause notice dated 19.08.2006 was issued to all the concerned Engineers who were responsible for reconstruction work of Narayanpur-Bikrampur-Sangrampur embankment including the petitioner. The reply to the show-cause notice submitted by the petitioner was found unsatisfactory and, therefore, a regular departmental proceeding vide Departmental Resolution no. 2981 dated 12.11.2008 under Rule 43(b) of the Jharkhand Pension Rules was initiated against the petitioner. The said embankment was collapsed on 11.07.2006 and the petitioner retired on 31.01.2008, whereas, the departmental resolution for initiation of departmental proceeding against the petitioner was dated 12.11.2008. The departmental enquiry had been initiated within the time prescribed under Rule 43(b) of the Jharkhand Pension Rules. The reconstruction work was not carried out as per sanctioned and approved design and, therefore, direction was issued for deduction of 5% from the pension for 5 years of the petitioner. The petitioner has failed to satisfy the departmental authority. Thus, there is no illegality in the impugned order dated 16.04.2019.

6. Mr. V.N. Jha, learned counsel for the petitioner assailed the impugned order on the ground that the charge-sheet was issued in the year 2008 for the event of the year 2005 and the impugned order has been passed in the year 2019. He further submitted that the Chief Engineer has got no jurisdiction to inspect the

allegation against the petitioner, which is violation of Jharkhand CCA Rules, 2005. He also submits that only the higher rank authority can inspect the allegation against the petitioner. He further submitted that second show-cause notice is vague as no punishment was suggested therein. He also submitted that the petitioner retired on 31.01.2008. The charge-sheet was issued upon the petitioner on 12.11.2008 and after lapse of 4 years of event, the said proceeding was initiated against the petitioner. He further submitted that neither any date of departmental enquiry was fixed nor the venue for conducting the departmental enquiry was fixed. The petitioner was transferred in the year 2005 and, thereafter, his successor was there and in that view of the matter, the punishment cannot be fastened upon the petitioner. He further submitted that no witnesses were examined in the departmental proceeding, even the person who has inspected the site was not examined. He also submitted that proposed punishment is vitiated and the proceeding under Rule 43(b) of the Jharkhand Pension Rules is incompetent, without jurisdiction and the same cannot sustain in the eyes of law. What is the law, has not been determined and in spite of that this punishment order has been passed after lapse of 14 years of the event.

7. Mr. Anshuman Kumar, learned counsel for the respondent-State repeated his arguments, as made out in the counter affidavit, which have already been noted herein above. He submitted that in terms of Rule 43(b) of the Jharkhand Pension Rules, the petitioner has not been able to prove his case before the departmental proceeding and, therefore, there is no illegality in the impugned order.

8. In view of the rival submissions of the learned counsel for the parties, this Court has proceeded to examine the contention of the parties. It is admitted fact that the petitioner retired on 31.01.2008. The departmental proceeding was

initiated on 12.11.2008 and the impugned order has been passed on 16.04.2019 i.e. after lapse of 11 years. In this regard, reference may be made to Rule 43(b) of the Jharkhand Pension Rules, which is quoted herein below:

"43(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 a 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 any event which 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."

9. A reading of Rule 43(b) would indicate that the State Government was empowered to withhold or withdraw the whole or part of the amount of pension, permanently or for a specified period, if the pensioner was found to be guilty of grave misconduct in any departmental or judicial proceeding, or to have caused

pecuniary loss to Government by misconduct or negligence, during the tenure of his service. The proviso speaks about the initiation of proceedings. For initiating proceedings, Rule 43(b) puts some conditions i.e. departmental proceeding as indicated in Rule 43(b) if not instituted while the Government servant was on duty then it shall not be instituted except; (a) with the sanction of the Government, (b) it shall be in respect of an event which took place not more than four years before the institution of the proceedings; (c) such proceeding shall be conducted by the enquiry officer in accordance with the proceedings by which dismissal of the services can be made. The explanation of the said proviso only deals with the condition for initiation of the proceeding and the period of limitation within which such initiation of the proceedings can be done and in that view of the matter, initiation of the proceeding is barred and in the present case, the proceeding was initiated much after the retirement of the petitioner. In this regard, reference may be made to the case of **State of Bihar & Ors. v. Mohd. Idris Ansari**, reported in **AIR 1995 SC 1853**. Paragraph 7 of the said judgment is quoted herein below:

"7. A mere look at these provisions shows that before the power under Rule 43(b) can be exercised in connection with the alleged misconduct of a retired Government servant, it must be shown that in departmental proceedings or judicial proceedings the concerned Government servant is found guilty of grave misconduct. This is also subject to the rider that such departmental proceedings shall have to be in respect of misconduct which took place not more than four years before the initiation of such proceedings. It is, therefore, apparent that no departmental proceedings could have been initiated in 1993 against the respondent under Rule 43(a) and (b), in connection with the alleged misconduct, as it alleged to have taken place in the year 1986-87. As the alleged misconduct by 1993 was at least six years old, Rule 43(b) was out of picture. Even the respondent authorities accepted this legal position when they issued notice dated 27-9-1993. It was clearly stated therein that no action can be taken under Rule 43 (b) of the Rules as the period of charges has been old by more than four years. It is equally not possible for the authorities to rely on the earlier notice dated 17-10-1987 as proceedings pursuant to it were quashed by the High Court in Writ Petition 6696 of 1991 and only liberty reserved to the respondent was to start fresh proceedings. The High Court did not permit the respondent to resume the earlier departmental inquiry pursuant to

the notice dated 17-10-1987 from the stage it got vitiated. The respondent also, therefore, did not rely upon the said notice dated 17-10-1987 but initiated fresh departmental inquiry by the impugned notice dated 27-9-1993. Consequently it is not open to the learned Advocate for the appellant to rely upon the said earlier notice dated 17-10-1987."

10. The charge against the petitioner has not been proved which is evident from the Enquiry Report contained in Annexure-6, wherein, suggestion of exoneration is also there. In view of the second show-cause notice dated 04.08.2017 contained in Annexure-7, it transpires that the authority concerned has recorded that collapse of embankment can be said to be a natural calamity and in the said notice, no charge is being proved against anybody. No reason has been assigned as to why the Enquiry Officer's report has not been accepted by the respondent-authority. If any disagreement with the Enquiry Officer's report was there, an opportunity of hearing should be provided to the petitioner by the authority concerned, which has not been provided in this case. In this regard, reference may be made to the case of ***Lav Nigam v. Chairman & MD. ITI Ltd. & another***, reported in ***(2006) 9 SCC 440***. Paragraph 10 of the said judgment is quoted herein below:

"10. The conclusion of the High Court was contrary to the consistent view taken by this Court that in case the disciplinary authority differs with the view taken by the inquiry officer, he is bound to give a notice setting out his tentative conclusions to the appellant. It is only after hearing the appellant that the disciplinary authority would at all arrive at a final finding of guilt. Thereafter, the employee would again have to be served with a notice relating to the punishment proposed."

11. In view of the above facts and considering the law point which has been discussed herein above, it is clear that the respondents had not followed their own regulations. In the present case, Rule 43(b) of the Jharkhand Pension Rules has not been followed.

12. The seeds of the right to receive pension, emerge from the very day an employee enters a pensionable service. From that very date the employee

commences to accumulate qualifying service. His claim for pension would obviously crystallise, when he acquires the minimum prescribed qualifying service, and also, does not suffer a disqualification, disentitling him to claim for pension. Any employee governed by a pension scheme, enrolls to earn qualifying service, immediately on his enrollment into the pensionable service. Every such employee must be deemed to have commenced to invest in his eventual claim for pension, from the very day he enters service.

13. The pension is property within the meaning of Article 300-A of the Constitution of India and executive instructions which do not have any statutory sanction cannot be termed as law within the meaning of Article 300-A. In absence of any statutory Rules for withholding pension or gratuity, such act cannot be allowed to be done by way of executive instruction. Reference may be made to the case of **State of Jharkhand & Ors. v. Jitendra Kumar Srivastava & another**, reported in **(2013) 12 SCC 210**. Paragraphs 13, 14 and 17 of the said judgment are quoted herein below:

"13. A reading of Rule 43(b) makes it abundantly clear that even after the conclusion of the departmental inquiry, it is permissible for the Government to withhold pension, etc. only when a finding is recorded either in departmental inquiry or judicial proceedings that the employee had committed grave misconduct in the discharge of his duty while in his office. There is no provision in the Rules for withholding of the pension/gratuity when such departmental proceedings or judicial proceedings are still pending.

14. *The right to receive pension was recognised as a right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad v. State of Bihar, as is apparent from the following discussion:*

"27. The last question to be considered, is, whether the right to receive pension by a government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.

28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated 12-6-1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and

31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on 5-8-1996. There is only a bald averment in the counter-affidavit that no question of any fundamental right arises for consideration. Mr Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned counsel to urge that if the State had passed an order granting pension and later on resiles from that order, the latter order may be considered to affect the petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.

29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of qualifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the rules. The rules, we have already pointed out, clearly recognise the right of persons like the petitioners to receive pension under the circumstances mentioned therein.

30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in *Bhagwant Singh v. Union of India*. It was held that such a right constitutes 'property' and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. The Letters Patent Bench in its decision in *Union of India v. Bhagwant Singh* approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is 'property' within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as 'property' cannot possibly undergo such mutation at the whim of a particular person or authority.

31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in *K.R. Erry v. State of Punjab*⁹. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to

superannuation pension including its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

32. *This Court in State of M.P. v. Ranojirao Shinde had to consider the question whether a 'cash grant' is 'property' within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing 'it is obvious that a right to sum of money is property'.*

33. *Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by clause (5) of Article 19. Therefore, it follows that the order dated 12-6-1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of writ of mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law."*

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17. *It hardly needs to be emphasised that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different."*

14. As a cumulative effect of the facts, law points and judgments as discussed herein above, the impugned order cannot sustain in the eyes of law. Accordingly, the impugned order dated 16.04.2019 passed by respondent no.3 is, hereby, quashed. The petitioner shall be entitled for all the consequential benefits.

15. Accordingly, this writ petition stands allowed and disposed of.

(Sanjay Kumar Dwivedi, J.)

Jharkhand High Court, Ranchi
Dated: the 7th July, 2020
Ajay/ A.F.R.