Supreme Court of India
State Of Jharkhand & Ors vs Jitendra Kumar Srivastava & Anr on 14 August, 2013
Author: .....J.
Bench: K.S. Radhakrishnan, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 6770 OF 2013
(Arising out of Special Leave Petition (Civil) No. 1427 of 2009)

State of Jharkhand & Ors. ….. Appellant(s)

Vs.

Jitendra Kumar Srivastava & Anr.
…..Respondent(s)

WITH
C.A. No. 6771/2013
(arising out of SLP(C) No. 1428 of 2009)

J U D G M E N T

A.K. Sikri, J

1. Leave granted.

2. Crisp and short question which arises for consideration in these cases is as to whether, in the absence of any provision in the Pension Rules, the State Government can withhold a part of pension and/or gratuity during the pendency of departmental/ criminal proceedings? The High Court has -

answered this question, vide the impugned judgment, in the negative and hence directed the appellant to release the withheld dues to the respondent. Not happy with this outcome, the State of Jharkhand has preferred this appeal.

3. For the sake of convenience we will gather the facts from Civil Appeal arising out of SLP(Civil) No. 1427 of 2009. Only facts which need to be noted, giving rise to the aforesaid questions of law, are the following:

The respondent was working in the Department of Animal Husbandry and Fisheries. He joined the said Department in the Government of Bihar on 2.11.1966. On 16.4.1996, two cases were registered against him under various Sections of the Indian Penal Code as well as Prevention of Corruption Act, alleging serious financial irregularities during the years 1990-1991, 1991-1992 when he was posted as Artificial Insemination Officer, Ranchi. On promulgation of the Bihar Reorganisation Act, 2000, State of Jharkhand (Appellant herein) came into existence and the Respondent became the employee of the appellant State. Prosecution, in respect of the aforesaid two criminal cases against the respondent is pending. On 30th January, 2002, the appellant also ordered initiation of disciplinary action against him. While these proceedings were still pending, on attaining -

the age of superannuation, the respondent retired from the post of Artificial Insemination Officer, Ranchi on 31.08.2002. The appellant sanctioned the release and payment of General Provident Fund on 25.5.2003. Thereafter, on 18.3.2004, the Appellant sanctioned 90 percent provisional pension to the respondent. Remaining 10 percent pension and salary of his suspension period (30.1.2002 to 30.8.2002) was withheld pending outcome of the criminal cases/ departmental inquiry against him. He was also not paid leave encashment and gratuity.

4. Feeling aggrieved with this action of the withholding of his 10 percent of the pension and non-release of the other aforesaid dues, the respondent preferred the Writ Petition before the High Court of Jharkhand. This Writ Petition was disposed of by the High Court by remitting the case back to the Department to decide the claim of the petitioner for payment of provisional pension, gratuity etc. in terms of Resolution No. 3014 dated 31.7.1980. The appellant, thereafter, considered the representation of the respondent but rejected the same vide orders dated 16.3.2006. The respondent challenged the rejection by filing another Writ Petition before the High Court. The said petition was dismissed by the learned Single Judge. The respondent filed Intra Court Appeal which has been allowed by the Division Bench vide the -

impugned orders dated 31.10.2007. The Division Bench has held that the question is squarely covered by the full Bench decision of that Court in the case of Dr. Dudh Nath Pandey vs. State of Jharkhand and Ors. 2007 (4) JCR 1. In the said full Bench Judgment dated 28.8.2007, after detailed discussions on the various nuances of the subject matter, the High Court has held:

> " To sum up the answer for the two questions are as follows:
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> (i) Under Rule 43(a) and 43(b) of Bihar Pension Rules, there is no power for the Government to withhold Gratuity and Pension during the pendency of the departmental proceeding or criminal proceeding. It does not give any power to withhold Leave Encashment at any stage either prior to the proceeding or after conclusion of the Proceeding.
>
> (ii) The circular, issued by the Finance Department, referring to the withholding of the leave encashment would not apply to the present facts of the case as it has no sanctity of law".

5. Mr. Amarendra Sharan, the learned Senior Counsel appearing for the petitioner accepted the fact that in so far as the Pension Rules are concerned, there is no provision for withholding a part of pension or gratuity. He, however, submitted that there are administrative instructions which permit withholding of a part of pension and gratuity. His submission was that when the rules are silent on a particular aspect, gap can be filled by the -

administrative instructions which was well settled legal position, laid down way back in the year 1968 by the Constitution Bench Judgment of this Court in Sant Ram Sharma vs. Union of India 1968 (1) SCR 111. He, thus, argued that the High Court has committed an error in holding that there was no power with the Government to withhold the part of pension or gratuity, pending disciplinary/criminal proceedings.

6. The aforesaid arguments of the learned Senior Counsel based on the judgment in Sant Ram Sharma would not cut any ice in so far as present case is concerned, because of the reason this case has no applicability in the given case. Sant Ram judgment governs the field of administrative law wherein the Constitution Bench laid down the principle that the rules framed by the authority in exercise of powers contained in an enactment, would also have statutory force. Though the administration can issue administrative instructions for the smooth administrative function, such administrative instructions cannot supplant the rules. However, these administrative instructions can supplement the statutory rules by taking care of those situations where the statutory rules are silent. This ratio of that judgment is narrated in the following manner:

> "It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade
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> officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions and inconsistent with the rules already framed".

There cannot be any quarrel on this exposition of law which is well grounded in a series of judgments pronounced post Sant Ram Sharma case as well. However, the question which is posed in the present case is altogether different.

7. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:

> "The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?
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> What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

The antiquated notion of pension being a bounty a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".

8. It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away without the due process of law as per the provisions of Article 300 A of the Constitution of India.

9. Having explained the legal position, let us first discuss the rules relating to release of Pension. The present case is admittedly governed by -

Bihar Pension Rules, as applicable to the State of Jharkhand. Rule 43(b) of the said Pension Rules confers power on the State Government to withhold or withdraw a pension or part thereof under certain circumstances. This Rule 43(b) reads as under:

> "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 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 to grave misconduct, or to have caused

> pecuniary loss to Government misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement".

From the reading of the aforesaid Rule 43(b), following position emerges:-

> (i) The State Government has the power to withhold or withdraw pension or any part of it when the pensioner is found to be guilty of grave misconduct either in a departmental proceeding or judicial proceeding.
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> (ii) This provision does not empower the State to invoke the said power while the department proceeding or judicial proceeding are pending.
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> (iii) The power of withholding leave encashment is not provided under this rule to the State irrespective of the result of the above proceedings.
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> (iv) This power can be invoked only when the proceedings are concluded finding guilty and not before.

10. There is also a Proviso to Rule 43(b), which provides that:-

> "A. Such departmental proceedings, if not instituted while the Government Servant was on duty either before retirement or during re-employment.
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> i. Shall not be instituted save with the sanction of the State Government.
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> ii Shall be in respect of an event which took place not more than four years before the institution of such proceedings.
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> 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:-
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> B. Judicial proceedings, if not instituted while the Government Servant was on duty either before retirement or during re-employment shall have been instated in accordance with sub clause (ii) of clause (a) and C. The Bihar Public Service Commission, shall be consulted before final orders are passed.

It is apparent that the proviso speaks about the institution of proceedings. For initiating proceedings, Rule 43(b) puts some conditions, i.e, Department 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,

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(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 proceedings shall be conducted by the enquiry officer in accordance with the proceedings by which dismissal of the services can be made.

Thus, in so far as the proviso is concerned that deals with condition for initiation of proceedings and the period of limitation within which such proceedings can be initiated.

11. 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.

12. Right to receive pension was recognized as right to property by the Constitution Bench Judgment of this Court in Deokinandan Prasad vs. State of Bihar; (1971) 2 SCC 330, as is apparent from the following discussion:

"29. 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.

30. According to the petitioner the right to receive pension is property and the respondents by an executive order dated June 12, 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 August 5, 1966. 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.

31. 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 quantifying 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 petitioner to receive pension under the circumstances mentioned therein.

32. 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 A.I.R. 1962 Pun

503. 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 I.L.R. 1965 Pun 1 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.

33. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. The State of Punjab I.L.R. 1967 P & H 278. 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.

34. This Court in State of Madhya Pradesh v. Ranojirao Shinde and Anr. MANU/SC/0030/1968 : [1968]3SCR489 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".

35. 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 Sub-article (5) of Article 19. Therefore, it follows that the order dated June 12, 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 (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 a Writ of Mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law".

13. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum--

Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.

Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property".

14. Article 300 A of the Constitution of India reads as under:

> "300A Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law." Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300 A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced.

15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article 300A. 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.

16. We, accordingly, find that there is no merit in the instant appeals as the impugned order of the High Court is without blemish. Accordingly, these appeals are dismissed with costs quantified at Rs. 10,000/- each.

.....J.

[K.S. Radhakrishnan] .....J.

[A.K. Sikri] New Delhi August 14, 2013