

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.16272 of 2017

Tajbar Tabbasum W/o Late Nabi Akhtar, Resident of Mohalla- Miskaur, Suhir Patti, Motihari, P.S.- Motihari, District- East Champaran.

... .. Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Animal Husbandry Department, Govt. of Bihar, Patna.
3. The Director, Animal Husbandry Department, Govt. of Bihar Patna.
4. The Regional Deputy Director, Darbhanga Division, Darbhanga.
5. The Treasury officer, Motihari.
6. The Accountant General, Bihar, Patna.
7. The Branch Manager, Punjab National Bank, Motihari, East Champaran.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mr.Bajarangi Lal, Advocate. Mr. Ashish Kumar Ghosh, Advocate.
For the State	:	Mr.Sajid Salim Khan, SC-25 Mr. Arif Daula Siddiqui, AC to SC-25.
For the A.G.	:	Mr. Ram Yash Singh, Advocate.

CORAM: HONOURABLE MR. JUSTICE PURNENDU SINGH

ORAL JUDGMENT

Date : 02-05-2023

Heard Mr. Bajrangi Lal, learned counsel assisted by

Mr. Ashish Kumar Ghosh, learned counsel appearing on behalf of the petitioner; Mr. Sajid Salim Khan, learned SC-25 assisted by Mr. Arif Daula Siddiqui, learned AC to SC-25 for the State and Mr. Ram Yash Singh, learned counsel for the Accountant General.

2. Let the supplementary counter affidavit filed on behalf respondent nos. 1 to 3 be kept on record.

3. In compliance of the order dated 03.04.2023,



statements made in Paragraph Nos. 6, 7, 9, 10 and 11 of the supplementary counter affidavit which are, *inter alia*, reproduced as follows:

“6. That in continuation of and in furtherance to the statement made in the counter affidavit it is most humbly stated and submitted that the petitioner is not entitled to the benefit of dearness allowance over the family pension she receives on account of the death of her husband.

7. That by order dated 03.04.23, this Hon’ble Court had been pleased to allow the request of the Respondents to appraise the Hon’ble Court with regard to the clarification which has been sought for from the Finance Department as to whether Circular No. 3556 dated 09.05.1991 must be strictly followed and its subsequent amendment will have its effect only from the date of its amendment or from the year, 1991.

9. That on careful consideration of the facts of the case, the Finance Department has opined that the amendment of Rule 186 (3) in the Bihar Pension Rules shall be effective with immediate effects from the dated on notification i.e. 23/02/2016 and by that cause alone, it cannot be deemed to be effective from retrospective effect.

10. That Regardless, the Finance Department has further opined that the restriction of payment of dearness allowance to dependent of deceased employee who has been appointed on compassionate appointment is operative since long by virtue of Finance Department Circular No. 3556 dated 09.05.1991 which has also been confirmed by Letter No. 978 dated 04.03.2004.

11. That the Finance Department has further opined that the Finance Department Letter No. 537 dated 04.02.2002 is fundamentally different to the extent that the Dearness Allowance over the family pension of a deceased employee is payable to the dependent who has been independently employed.”

4. Learned counsel appearing on behalf of the petitioner submits that the Circular No. 3556 dated 09.05.1991, confirmed by Letter No. 978 dated 04.03.2004 was subject



matter of the C.W.J.C. No. 2434 of 2002. The claim was rejected by a learned Single Judge of this Court and the writ petitioner had preferred L.P.A. No. 717 of 2002. The Division Bench set aside the order of the learned Single Judge and directed the respondents to make payment of “dearness allowance” on the amount of family pension to the appellant of the said case. The Hon’ble Division Bench has further clarified that Circular dated 09.05.1991 refers to an employment and re-employment occasioned due to death of employee, but does not cover a case where a person getting family pension has already been employed independently at the time of such eventuality. In such cases, dearness allowance is payable on family pension. Paragraph Nos. 4 to 9 which are relevant to decide the present case are, *inter alia*, reproduced hereunder:

“4. The question in this case lies in a narrow compass. The appellant is in government service. Her husband was also in government service. After the death of her husband, she was getting family pension. The only controversy is as to whether on family pension she is entitled to dearness allowance or not. The learned Single Judge rejected the said prayer relying upon the circular of the State Government dated 9.5.1991 wherein paragraph 2 thereof provides inter alia that dearness allowance on the family pension shall be denied to a person if he has been re-employed or employed in State Government service or Central Government Service or its department etc.

5. The learned counsel for the appellant submitted that the word 'employed or re-employed' in paragraph 2 of the said circular of the State Government refers to an employment and re-employment occasioned due to death of employee, but does not cover a case where a person getting the family



pension has already been employed independently at the time of the aforesaid eventuality. In support of the aforesaid submission she has relied upon a judgment of the Apex court in the Case of H.S.E.B. and others vs. Azad Kaur, reported in (2000) 3 Supreme Court Cases 227.

6. The learned counsel appearing for the State on other hand submitted that once the person is employed in the Government Service, he is not entitled to dearness allowance on the family pension. It is wholly immaterial whether that employment was independent one or necessitated because of the death of the employee concerned.

7. We find force in the aforesaid submission advanced on behalf of the learned counsel for the appellant. This case is fully covered by the law laid down by the Apex Court in the case of H.S.E.B. and others (supra), where the word 'employed or re-employed' as similar to the present provision was a matter of determination and the Apex Court held that if the person is independently employed in that situation the ad hoc relief cannot be denied to the holder of the family pension.

8. In our view, the learned Single Judge was thus not justified in holding that the appellant was not entitled to the dearness allowance on the family pension.

9. Accordingly, the impugned order is set aside and the respondents are directed to make payment of dearness allowance on the amount of family pension to the appellant.”

5. Learned counsel appearing on behalf of the petitioner submitted that Petitioner's main claim is that even though she was employed on class-IV post on compassionate ground after the death of her husband on 02.03.1988 she is entitled to dearness allowance on her family pension. He further submitted that the petitioner was appointed on class-IV post on compassionate ground on 30.01.1991 and before that on 07.08.1989, the Accountant General, Bihar issued Pension



Payment Order (P.P.O) for payment family pension along with dearness allowance. He further submitted that the petitioner is aggrieved by the action of the concerned respondents that after the petitioner was appointed on compassionate ground, they started deducting certain amount from the family pension with effect from February, 1991 to July 1994 on the ground that dearness allowance is not admissible to the petitioner as she is herself is an employee. The petitioner has challenged the said action of the State Government in the writ petition on the ground that the dearness allowances on family pension cannot be denied even if the holder of the family pension is employed or re-employed in the State Government Service or Central Government Service in any department. Further submission is that the Circular No. 3556 dated 09.04.1991, which has been reiterated by the State Government in a communication contained in Letter No. 978 dated 04.03.2004 a clarification has been made in paragraph no. 5 that the instructions contained in circular no. 3556 dated 09.05.1991 has to be strictly followed so far as it relates to dearness allowance on family pension to pensioner, who has been re-employed or employed in government service. The said circular was subject matter in case of one Smt. Shardha Devi, in whose case also, the dearness



allowance was withdrawn had filed CWJC No. 2434 of 2002 (Smt. Shardha Devi vs. The State of Bihar) but the learned Single Judge of this Court had disallowed the claim of the petitioner. Learned counsel further stated that the writ Court's order was challenged by the said Smt. Shardha Devi before the Division Bench in L.P.A No. 717 of 2002 (Smt. Shardha Devi vs. The State of Bihar) reported in 2002 (3) PLJR 527, in which the Division Bench has held that dearness allowance on family pension is payable. After relying on the law laid down by the Apex Court in Case of *H.S.E.B & Ors. Vs. Azad Kaur reported in (2000) 3 SCC 227*, where the word 'employed or re-employed' as similar to the present provision was a matter of determination. The Hon'ble Apex Court held that if the person is independently employed in that situation the ad-hoc relief cannot be denied to the holder of the family pension and directed the respondents to make payment of dearness allowances on account of family pension. The clarification which has been brought by letter dated 04.02.2002 is being reproduced hereunder:

“पत्रांक— पी0सं0-11/2000

बिहार सरकार

वित्त विभाग

प्रेषक— एम0 एम0 प्रसाद
वित्त आयुक्त ।



सेवा में,

महालेखाकार,

वीरचन्द्र पटेल पथ, पटना।

पटना / दिनांक- 4.2.2002

विषय : पेंशन भोगी कर्मियों को पेंशन / पारिवारिक पेंशन पर महंगाई राहत भुगतान के सम्बन्ध में।

महाशय,

बिहार पेंशन नियमावली के संबद्ध प्रावधानों एवं वित्त विभाग के परिपत्र संख्या- 3556 दिनांक- 9.5.91 के तहत पुनर्नियुक्त / नियोजित पेंशन / पारिवारिक पेंशन भोगी को पेंशन / पारिवारिक पेंशन की राशि पर महंगाई राहत का भुगतान उसके सेवा काल तक स्थगित रखने का सिद्धान्त अपनाया गया है।

2. सरकार की जानकारी में यह तथ्य सामने आया है कि कतिपय कोषागारों में / बैंकों के द्वारा उपर्युक्त परिपत्र संख्या- 3556 दिनांक 9.5.91 का सहारा लेते हुए यह दृष्टिकोण अपनाया गया है कि यदि किसी पेंशन धारक को पारिवारिक पेंशन भी मिल रहा हो तो उसे केवल अपनी पेंशन पर ही महंगाई राहत देय होगा पारिवारिक पेंशन पर कोई महंगाई राहत देय नहीं होगा।

3. परिपत्र संख्या- 3556 दिनांक- 9.5.91 केवल वैसे मामलों में प्रभावी है जिसमें कोई पेंशन पानेवाला व्यक्ति पुनर्नियुक्त हो जाय या पारिवारिक पेंशन पानेवाला व्यक्ति सरकारी सेवा में या सरकारी उपक्रमों में स्वयं नियोजित हो। पेंशन नियमावली में या उपर्युक्त संकल्प में ऐसा कोई प्रावधान नहीं है कि किसी पेंशन धारक को यदि वह पारिवारिक पेंशन भी पाता हो, तो पारिवारिक पेंशन पर महंगाई राहत देय नहीं होगा। माननीय उच्च न्यायालय द्वारा भी कतिपय मामलों में रिट याचिका सं0- 10391/2000 श्रीमती यशोधरा देवी बनाम राज्य सरकार एवं 12309/2000 वृज नंदन प्रसाद बनाम राज्य सरकार में बिहार पेंशन नियमावली तथा उपर्युक्त संकल्प के आधार पर यही निष्कर्ष निकाला गया है।

4. उपर्युक्त के आलोक में यह स्पष्ट किया जाता है कि वैसी अवस्था में जहां सरकार द्वारा नियोजित दंपति में एक की मृत्यु हो गई और दूसरा सेवा निवृत्त होकर पेंशनभोगी हो, तो उन्हें देय पेंशन पर महंगाई राहत के अतिरिक्त पारिवारिक पेंशन पर भी महंगाई राहत देय होगा।

5. अनुरोध है कि उपर्युक्त स्पष्टीकरण के आलोक में आवश्यक कार्रवाई की जाय।

ह0/- अस्पष्ट



एम0 एम0 प्रसाद
वित्त आयुक्त।”

6. Per contra, learned counsel appearing on behalf of the respondent- State submitted that the amendment was brought in Rule 186(3) in Bihar Pension Rules vide notification dated 23.02.2016 that dearness allowance over the family pension of a deceased employee is payable to the dependent, who has been independently employed has been clarified by circular no. 978 dated 04.03.2004, the State Government has reiterated to follow strictly instructions contained in circular no. 3556 dated 09.05.1991. The circular no. 3556 dated 09.05.1991 provides that re-employed pensioners will not be paid dearness allowance, thereafter, Sub-Rule 3 was inserted after Sub-Rule (2) of Rule 186 of Bihar Pension Rules 1950 by Bihar Pension (Amendment) Rules, 2016. Sub-Rule 3(ii) provides that any person appointed on compassionate ground by the Government, dearness allowance on the family pension shall not be admissible. In view of the amended provision, the petitioner is not entitled to get dearness allowance on her family pension and such deduction of dearness allowance from her family pension has rightly been made. On the basis of the noting made by the bank authority on the representation where it has been observed that the petitioner is not entitled to the relief in view of the



government circular. Learned counsel further submitted that the respondent-State has clarified by filing supplementary affidavit and have made specific statement that the amended provision of Rule 186 vide notification dated 23.02.2016 will be effective from the date of notification and cannot be deemed to be effective from retrospective effect. He further submitted that the Finance Department has further opined that the restriction of payment of dearness allowance to the dependent of deceased employee, who has been appointed on compassionate ground is operative since long by virtue of the Finance Department circular no. 3556 dated 09.05.1991, which has also been confirmed by letter no. 978 dated 04.03.2004.

7. Having heard the parties.

8. Having heard the rival submissions of the parties and the pleadings made in the writ petition, supplementary affidavit and the supplementary counter affidavit filed on behalf of the respondent, in compliance of the order dated 03.04.2023 a supplementary counter affidavit has been filed with respect to the effective date of operation of Letter No. 978 vide an amendment was brought in the year 2016 by inserting Sub Rule 3(ii) of Sub-Rule (2) of Rule 186 of the Bihar Pension Rules, 1950.



9. The undisputed facts of the case are that the husband of the petitioner died in harness on 02.03.1998. Thereafter, family pension along with dearness allowance was sanctioned to the petitioner on 03.03.1988. The petitioner was appointed on compassionate ground on 01.02.1991. Subsequently, the State government came out with a circular No. 3556 dated 09.05.1991 disallowing dearness allowance on family pension to reemployed pensioners. The said Circular was reiterated vide another circular no.978 dated 04.03.2004 wherein instructions were issued to strictly follow earlier circular dated 09.05.1991 and the petitioner has been denied the benefit which was granted to him on 03.03.1988.

10. The amendment brought by inserting Sub-Rule (3) after Sub-Rule (2) of Bihar Pension Rules, 1950 has not been challenged in the present writ petition. The circular no. 3556 dated 09.05.1991 has been set aside by a Division Bench of this Court in LPA No. 717 of 2002. Now by inserting Clause (3) in Sub-Rule 2 of the Rule 186 of the Bihar Pension Rules with circular contained in Memo No. 180 dated 23.02.2016, the benefit which was granted to the petitioner has been taken away.

“2. उक्त नियमावली, 1950 के नियम-186 के उप नियम (2) के बाद निम्नलिखित उप नियम-(3) जोड़ा जाएगा :-

“(3) (i) सरकार द्वारा स्वतंत्र रूप से नियोजित दम्पति में से किसी एक की मृत्यु होने एवं दूसरे के सेवारत रहने पर उन्हें वेतन



के अतिरिक्त परिवार पेंशन पर महँगाई राहत अनुमान्य होगा।

(ii) अनुकम्पा के आधार पर नियुक्त कर्मी को परिवार पेंशन पर सेवानिवृत्ति तक महँगाई राहत अनुमान्य नहीं होगा। परन्तु सेवानिवृत्ति के उपरान्त परिवार पेंशन पर महँगाई राहत अनुमान्य हो जाएगा।”

11. The amendment brought by inserting Sub-Clause (ii) of Sub-Rule 3 of Rule 186 of Bihar Pension Rules, not only is against the law laid down by the Apex Court in case of *H.S.E.B & Ors. Vs. Azad Kaur (supra)* but also in the case of *Smt. Shardha Devi (supra)* passed in L.P.A. No. 717 of 2002. This Court can only observe in absence of any challenge to the said Rule by the petitioner in the present writ petition, the same is left to be decided if the said rule is challenged by any aggrieved pensioner.

12. The Bihar Pension Rules is a beneficial piece of legislation and a vested right cannot be taken away by merely issuing executive instruction or retrospectively applying an amendment to the Rule. In this regard, the Apex Court in the case of **Brahampal Alias Sammay and Another Vs. National Insurance Company**, reported in (2021) 6 SCC 512, has held hereunder:

7. The interpretation of a beneficial legislation must be remedial and must be in furtherance with the purpose which the statute seeks to serve. The aforesaid view has been reiterated by this Court on multiple occasions wherein this Court has highlighted the importance acknowledging legislative intention while interpreting the provisions of the



statute. This Court in Bombay Anand Bhavan Restaurant v. ESI Corpn. [Bombay Anand Bhavan Restaurant v. ESI Corpn., (2009) 9 SCC 61 : (2009) 2 SCC (L&S) 573] while interpreting the provisions of the Employees' State Insurance Act held that it being a beneficial legislation should receive a liberal construction so as to promote its objectives. This Court held therein: (SCC p. 66, para 20)

“20. The Employees' State Insurance Act is a beneficial legislation. The main purpose of the enactment as the Preamble suggests, is to provide for certain benefits to employees of a factory in case of sickness, maternity and employment injury and to make provision for certain other matters in relation thereto. The Employees' State Insurance Act is a social security legislation and the canons of interpreting a social legislation are different from the canons of interpretation of taxation law. The courts must not countenance any subterfuge which would defeat the provisions of social legislation and the courts must even, if necessary, strain the language of the Act in order to achieve the purpose which the legislature had in placing this legislation on the statute book. The Act, therefore, must receive a liberal construction so as to promote its objects.”

(emphasis supplied)

13. It is admitted fact that the petitioner was receiving dearness allowance on family pension vide order dated 07.08.1989. It is also admitted that before deduction of certain amount from the family pension of the petitioner with effect from February, 1991 to July, 1994 on the ground that dearness allowance is not admissible to the petitioner as she has been employed from February, 1991 has already been set aside by the division Bench of this Court vide order dated 26.07.2002 passed in LPA No. 717 of 2002, **Smt. Shardha Devi (Supra)**, wherein this Court has held that circular dated 09.05.1991 does



not cover the case where a person is getting family pension who has already been employed independently at the time of such eventuality. In such case, dearness allowance is payable on family pension.

14. The petitioner was not given any opportunity before deducting any amount from her family pension. By this action the respondents and the respondent Bank have not only violated the principle of natural justice, but the action of the respondent Bank on the basis of the Pension Payment Order (P.P.O) issued to the petitioner, wholly without jurisdiction having denied the petitioner of having been heard. With regard to violation of natural justice, recently the Apex Court in the case of ***Chairman, State Bank of India and Another Vs. M. J. James*** reported in ***(2022) 2 SCC 301*** in Paragraph Nos.28 and 29 has held hereunder:

“28. Traditional English law recognised and valued the rule against bias that no man shall be a judge in his own cause i.e. nemo debet esse judex in propria causa; and the obligation to hear the other or both sides as no person should be condemned unheard i.e. audi alteram partem. To these, new facets sometimes described as subsidiary rules have developed, including a duty to give reasons in support of the decision. Nevertheless, time and again the courts have emphasised that the rules of natural justice are flexible and their application depends on facts of each case as well as the statutory provision, if applicable, nature of right affected and the consequences. In A.K. Kraipak v. Union of India [A.K. Kraipak v. Union of India, (1969) 2 SCC 262] the Constitution Bench, dwelling on the role of the principles of natural justice under our Constitution, observed that as every organ of the State is controlled and regulated by the rule of law, there is a requirement to act justly and fairly and not arbitrarily



or capriciously. The procedures which are considered inherent in the exercise of a quasi-judicial or administrative power are those which facilitate if not ensure a just and fair decision. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of law under which the enquiry is held and the constitution of the body of persons or tribunal appointed for that purpose. When a complaint is made that a principle of natural justice has been contravened, the court must decide whether the observance of that rule was necessary for a just decision in the facts of the case.”

29. *Legal position on the importance to show prejudice to get relief is also required to be stated. In State Bank of Patiala v. S.K. Sharma [State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364] a Division Bench of this Court distinguished between “adequate opportunity” and “no opportunity at all” and held that the prejudice exception operates more specifically in the latter case. This judgment also speaks of procedural and substantive provisions of law embodying the principles of natural justice which, when infringed, must lead to prejudice being caused to the litigant in order to afford him relief. The principle was expressed in the following words : (SCC p. 389, para 32)*

“32. Now, coming back to the illustration given by us in the preceding paragraph, would setting aside the punishment and the entire enquiry on the ground of aforesaid violation of sub-clause (iii) be in the interests of justice *or* would it be its negation? In our respectful opinion, it would be the latter. Justice means justice between both the parties. The interests of justice equally demand that the guilty should be punished and that technicalities and irregularities which do not occasion failure of justice are not allowed to defeat the ends of justice. Principles of natural justice are but the means to achieve the ends of justice. They cannot be perverted to achieve the very opposite end. That would be a counterproductive exercise.

15. The petitioner is a widow of deceased employee and she is also a class-IV employee and is receiving family pension. The action of the respondent- State in deducting the amount cannot be held to be legally sound. It was allegedly deducted by the state authority that in view of government



circulars, the petitioner is not entitled to dearness allowance is not sustainable as such action has already been set aside by the division Bench of this Court and the respondents have not challenged the same before any higher Court. Law is well settled in the case of **State of Punjab and Others Vs. Rafiq Masih (Whiter Washer) and Others** reported in (2015) 4 SCC 334. Paragraph 18 of the judgment is reproduced hereunder:

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”



16. In view of the the aforementioned judgments and discussions made hereinabove, the petitioner is directed to file a detailed representation before the concerned respondent for making payment of dearness allowance on account of family pension and the concerned respondent is directed to dispose of the representation of the petitioner within six weeks from the date of its filing in accordance with the law laid down by this Court as well as the Apex Court.

17. The writ application stands disposed of.

18. There shall be no order as to costs.

(Purnendu Singh, J)

mantreshwar/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	17.05.2023
Transmission Date	N.A.

