
(2002) 08 PAT CK 0013

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9326 of 2000

Bishun Deo Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 29-08-2002

Acts Referred:

Citation : (2002) 08 PAT CK 0013

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—Heard Mr. Jitendra Kumar Rai for the petitioner, learned JC to GP IV, and Mr. Chakradhari Sharan Singh learned Addl Standing Counsel for respondent No. 5 (the Accountant General, Bihar, Patna. This writ petition has been preferred with the prayer for an appropriate direction to the respondent authorities to give the retirement benefits to the petitioner who claims to have superannuated from the post of Panchayat Sevak, on completion of 58 years of age on 28.2.1996.

2. According to the writ petition, the petitioner had joined the services of the Bihar Government on 21.12.1956 as a Panchayat Sevak and was confirmed in service with effect from 12.12.1972. According to the further statements made in paragraph 7 of the writ petition, he was transferred from Madhepur Block to Madhwapur Block in 1979 which the petitioner did not join. The details with respect to the transfer are not stated in the writ petition, left alone annexing a copy of the transfer order. According to the further statements made in the writ petition, he was given his first time-bound promotion with effect from 1.4.1981 and the second time-bound promotion with effect from 1.4.1984, vide Annexure-1 wherein, according to the petitioner, he was shown to be posted at Madhepur. According to the seniority list dated 18.12.1992 (Annexure-2), showing the seniority of Panchayat Sevak as on 31.7.1991, the petitioner was shown to be posted at Madhepur. The petitioner reached the age of superannuation in February 1996, on completion of 58 years of age. The petitioner complains before this Court that he has not been paid his salary since

his transfer from Madhepur to Madhwapur from March 1979 till February, 1996, nor has been paid the post-retirement benefits. During the course of submissions. Learned Counsel for the petitioner has given up the claim for salary for the period 1979 to February 1996, and prays for release of the post-retirement benefits only. Secondly, learned Counsel submits that post-retirement benefits cannot, be withheld in view of the provisions of Rule 76 of the Bihar Service Code, and relies on a Division Bench judgment of this Court, reported in 1989 PLJR 485 Smt. Parvati Sengupta v. State of Bihar.

3. Learned Counsel for the respondents submit in opposition that the petitioner has taken a contradictory and in fact mutually destructive stand for not working at all between March, 1979 to February 1996. On the one hand, the writ petition states that the petitioner could not join at his new place of posting because he was never relieved from Madhepur Block. On the other hand, the petitioner had taken a different stand before the authorities. Learned Counsel next submit that the petitioner had abandoned his job way back in 1979 and, therefore, is not entitled to post-retirement benefits, not having drawn his salary since then. They next submit that the writ petition is hit by delay, laches, negligence and acquiescence.

4. I have perused the pleadings on record and considered the submissions of learned Counsel for the parties. It appears to me that the petitioner had last served the State Government some time in March 1979, till he was transferred from Madhepur to Madhwapur Block. He did not join his new place of posting ever, obviously to avoid his transfer to the new place. The petitioner has neither stated the date of his transfer, the date on which he last worked at Madhepur Block the date on which he handed over the charge, nor has annexed a copy his transfer order. Learned Government Counsel is right in his submission that the petitioner has taken a contradictory stand which disentitles him to any relief in discretionary writ jurisdiction. It is stated in paragraph 7 of the writ petition that he could not join the new place of posting. On the other hand, it is manifest from the undated letter addressed to the BDO, Madhepur (marked Annexure-A to the writ petition), and it appears from the endorsements thereon that +he same was perhaps filed towards the end of 1985, that he had handed overcharge at Madhepur Block to one Sukhdeo Karmachari, and was afflicted by T.B. after he had joined the Madhwapur Block. The undated letter marked Annexure-to the counter-affidavit, from the petitioner to the District Panchayati Raj Officer, Madhubani, and it appears from the endorsements thereon to be of April 1987, inter alia, states that he had fallen ill in Madhepur on 26.3.1979 and recovered after eight years. His joining was not being accepted by BDO, Madhepur, he may be directed to accept his joining, and may further be directed to regularise his leave. It is thus manifest that the petitioner has taken different stand on different occasions and it is not possible, on the petitioner's stand, to concluded whether he had handed over charge at Madhepur Block and had per joined the Madhwapur Block or not. In any I case, the stand taken by the petitioner in the writ petition is clearly different from the representations before the respondent

authorities way back in 1985 and 1986. The petitioner has not come to this Court with clean hands. This is surely an effort to mislead this Court which disentitles the petitioner from any relief in the prerogative, discretionary writ jurisdiction. Law is well-settled that an application for a writ may be refused by the Court upon a consideration of certain circumstances as disentitling the applicant to relief even though he may have a legal right which has been infringed, e.g., he has not come with clean hands or has obtained rule of the Court by misleading it or by misrepresentation. Reference may be made to the judgment of the Supreme Court reported in *Kundan Lal Vs. Angan Lal*, and the Division Bench judgment of this Court, reported in *Baidyanath Mahto and Others Vs. The Agricultural Produce Market Committee and Another* It has been held as follows in paragraph 6 of the judgment in *Baidyanath Mahto (supra)*:

6. Such conduct on the part of the petitioners disentitled them to any relief under the writ jurisdiction on this Court. This position is well-settled that when an applicant approaches the Court for discretionary and equitable relief, he must approach the Court with clear hands and must display utmost candour and clarity. There must not be any misrepresentation of vital facts in the writ petition on the basis of which the jurisdiction of the Court is invoked. This position has been reiterated by the Apex Court in the case of *Dr. Vijay Kumar Kathuria Vs. State of Haryana and Others*, and again in the case of *Welcom Hotel and Others Vs. State of Andhra Pradesh and Others*, . In an another recent judgment in the case of *T.N. Rugmani and Another Vs. C. Achutha Menon and Others*, the Supreme Court was pleased to observe at page 985 in Paragraph-3 as follows:

Even an assailable cause or illegal and arbitrary order may fail to move the conscience of the Court due to inequitable and unjustifiable behaviour or conduct in equitable jurisdiction.

5. The following observations of Viscount Reading in the judgment of the King's Bench Division reported in (1917) 1 KB 486 *The King v. The General Commissioner for the Purposes of the Income Tax Acts for the District of Kensington* is illuminating:

Where an ex-parte application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But, if the result of this examination and hearing it to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the

applicant in a proceeding which has only been set in motion by means of a misleading affidavit.

6. The petitioner has disentitled himself from relief for one more reason. It is an established principle of law that in order to be entitled to a writ of mandamus, the aggrieved person must make demand from the concerned authorities and there must be a refusal. It is manifest from the pleadings of the parties that the petitioner had never approached the respondent authorities for the reliefs prays for herein. De Smith, a leading authority on the subject, states in his classic entitled *Judicial Review of Administrative Action* (1980 Ed.) as follows:

The applicant must show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it. It is pre-eminently a discretionary remedy?.

The General Rule is that the applicant, before moving for the order, must have addressed a distinct and specific demand or request to the respondent that he perform the duty imposed upon him, and the respondent must have unequivocally manifested his refusal to comply. Where the respondent has not refused compliance in express terms, it is a question of fact whether his conduct evinces a clear determination not to comply. There may also be cases where the mere fact of non-compliance with a duty will be a sufficient ground for the award of a mandamus e.g. where the applicant has been substantially prejudiced by the respondent's procrastination. Delay in complying with the demand or request, the signification of readiness to comply only subject to conditions, or persistent temporising and failure to give a direct answer, may well be tantamount to refusal, but in same situations they cannot be properly be so construed.

7. On the own showing of the petitioner, he did not work at all from March, 1979 till February 1996. This appears to be clearly an enfort to avoid the order of transfer and never reported for duty at Madhwapur till his superannuation. It is further manifest that the petitioner had abandoned his job in March, 1979. Earned Counsel for the petitioner has placed reliance on Rule 76 of the Bihar Service Code which reads as follows:

76. Unless the State Government in view of the special circumstances of the case, shall otherwise determine, a Government servant, after the five years continuous absence from duty, elsewhere than on foreign service in India, whether with or without leave ceases to be in Government employ.

(a) No Government servant shall be granted leave of any kind for a continuous prior exceeding five years.

(b) Where a Government servant does not resume duty after remaining on leave for a continuous period of 5 years, or where a Government servant after the expiry of his leave remains absent from duty, otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave, granted to him, exceeds a continuous period of 5 years, he shall, unless

the State Government otherwise determine, be removed from service after following the procedure laid down in the Civil Services (Classification, Control & Appeal) Rules and Bihar & Orissa Subordinate Services (Discipline & Appeal) Rules, 1935.

It is thus manifest on a plain reading of the aforesaid provisions that Unless otherwise determined in terms of Rule 76, an employee of the Bihar Government will cease to be in Government employment after expiry of five years in case he had obtained leave which applies with greater force to the petitioner who remained absent without taking leave for continuous period of about sixteen years. Law is well-settled that leave has to be obtained in advent and then availed of which applies with much greater force in a situation like the present one. Reliance placed by learned Counsel for the petitioner on the Division Bench judgment of this Court *Pravawati Sengupta v. State of Bihar* (supra) is inapplicable to the facts and circumstances of the present case. That was a case where the petitioner had for a major period remained on sanctioned leave, and did not obtain leave for a smaller period because she had become a mental case, On the other hand, according to the petitioner's own case, he absented himself for a period of sixteen years without any information at all and without obtaining prior leave. He had obviously abandoned his job and ceased to be in Government employment by automatic operation of law after expiry of five years.

8. In the result, this writ petition is dismissed.