(2008) 01 PAT CK 0181

In the Patna High Court

Case No : CWJC No. 1950 of 2007

Brij Mohan Prasad APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 18-01-2008

Acts Referred:
Chotanagpur Tenancy Act, 1908 — Section 234

Citation : (2009) 2 PLJR 25

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Vidya Sagar and Samir Kumar Ranjan, for the Appellant; Ritesh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Navaniti Pd. Singh, J.—Petitioner retired from Government service as Head Clerk in T.B.D.C. Training Center on 28.2.1997. A certificate case being Certificate (Misc.) Case No. 17/04-05 was registered against four persons including the petitioner for recovery of Rs. 11,74,852.25 from each of the four persons named therein totaling to Rs. 46,99,409 on the charge of being defalcated amount. The petitioner challenges these proceedings. Petitioner contends that while he was in service, no proceedings were initiated against him-neither the departmental proceedings nor in relation to defalcation. No such proceeding was initiated with the aid of Rule 43 of the Bihar Pension Rules even after his superannuation. A criminal case was instituted for defalcation in which after due investigation police submitted final report, which was accepted by the Court and there was no protest by the authority, as such even the criminal case was closed. Now, in the year 2004, a proceeding under the Public Demands Recovery Act has been initiated being on basis of a recommendation of the Accountant General. Petitioner further submits that the Accountant General found another person guilty of fraudulent withdrawal against whom departmental proceeding was initiated in which the said person was held to be guilty. This departmental proceeding had continued even after superannuation of that person with the aid of Rule 43 of the Bihar Pension Rules. In those proceedings, the person had taken the plea that it was the petitioner, who was responsible but the department has rejected that defence. On the aforesaid ground, it was submitted that the proceedings are wholly without jurisdiction.

2. A counter affidavit has been filed in which apart from stating that the Accountant General held every one guilty of defalcation and that the order of the Certificate Officer refusing to drop the proceeding as against the petitioner was valid, nothing further is stated. The advice of the Accountant General has not been brought on record.

3. Heard the parties and with their consent this application is being disposed of at the stage of admission itself.

4. The first contention, as raised by the petitioner, is that the dues, as being sought to be recovered, are not public demand as contemplated under the provisions of Bihar and Orissa Public Demands Recovery Act. In my view, that is not a correct position in law.

5. Public Demands Recovery Act is meant for recovery of public demand as defined by Section 3, sub-section (6), which refers to Schedule-I to the Act. Schedule-I enumerates various demands under 15 heads to be public demand and item 3 reads as follows:-

"3. Any money which is declared by any law for the time being in force to be recoverable or realizable as an arrear of revenue or land-revenue, or by the process authorized for the recovery of arrears of revenue or of the public revenue or of Government revenue."

6. Public Accountants Default Act, 1850 provides that any money recoverable from "public accountants" as defined therein for loss caused by them or on account of defalcation in their accounts is recoverable as arrears or land revenue. Petitioner is public accountant as defined. If those dues are recoverable as arrears of land revenue, then those dues would fall within item 3 of Schedule-I of the Act ad thus it would become a public demand. Thus this contention of the petitioner cannot be accepted.

7. The petitioner next submits that once the petitioner superannuated the master servant relationship ended. No departmental proceeding whatsoever was initiated even with the aid of Rule 43B of the Bihar Pension Rules. While proceedings were initiated against others, who were found guilty even after their superannuation, no order was passed against the petitioner in any duly constituted proceedings holding petitioner to be guilty of defalcation. Even in criminal prosecution, which was initiated against the petitioner, police after due investigation submitted final form, which was accepted by the Criminal Court and thus there has been no proceeding against the petitioner. Thus, petitioner was not ever sent up for trial much less charged with defalcation of any amount. In

fine, it is submitted that in no duly constituted proceeding petitioner has been held guilty of defalcation of any amount but notwithstanding that for recovery the present proceeding has been initiated against others and petitioner''s name included therein. So far as others are concerned, at different stages they have been held guilty in different proceedings but petitioner has never been held guilty in any proceeding much less after notice to the petitioner.

8. Learned counsel for the petitioner relies on Board''s Instruction 10 in respect of implementation of the Act.

"Certificate procedure not to be used where there is any doubt of debtor''s liability.-Requiring officers should bear in mind that the certificate procedure is intended only for the recovery of sums regarding which there is no doubt of the liability of the debtor. Cases in which the debtor is likely with some show of reason to deny his liability should be reported with a view to institution of civil suits.

No such certificate shall be made in respect of any demand the recovery of which is barred by any law of limitation for the time being in force. In the case of rent due to Wards and Government estate the period of limitation depends upon the Tenancy Act applicable and is determined by Schedule-Ill Part-I of the Bihar Tenancy Act or Section 234 of the Chota Nagpur Tenancy Act, as the case may be.

The period of limitation for certificate filed by the examiner of Local Account under the Local Fund Audit is three years from the date of the order of surcharge."

9. Learned counsel for the petitioner submits that here is a case where the liability of the petitioner has not been ascertained by any competent authority rather in criminal proceeding petitioner stands exonerated. Thus, it cannot be said, as a matter of certainty, that the petitioner is guilty of defalcation and that too to the amount as indicated above. He submits that being the position, in view of Board''s Instruction 10 the authority cannot convert the certificate proceeding into a proceeding for executing an ex parte order as virtually the certificate proceedings are ex parte decree into execution. It is not open for the certificate court to determine the liability as an original authority in a summary manner and there having not been any other competent forum determining his liability the resort to the certificate proceeding ought not to have been taken.

10. Having considered the matter, I am of the view that the writ petition must succeed on this issue.

11. Certificate proceedings are proceedings for recovery of ascertained dues. It is not a proceeding where the Certificate Officer is to act like a Civil Court and determine the liability. The liability is, prima facie, predetermined and the proceedings are only for recovery of those predetermined liability.

12. Here in the present case, there have been no proceeding determining the liability of the petitioner. There being no ascertained legal liability as against the

petitioner there could not be a proceeding for its recovery.

13. Board''s Instruction 10, as quoted above, also comes to the aid of the petitioner. The petitioner could only be proceeded against if in any departmental proceeding he is held guilty. In such a departmental proceeding petitioner would have a right to defend himself against the alleged defalcation. The department would be required to establish defalcation by evidence and the petitioner would have a right to rebut the same.

14. Regrettably, no such proceedings were ever taken up against the petitioner, yet the petitioner is held guilty of defalcation and is being proceeded against for recovery of the assumed liability of the petitioner. This cannot be permitted. Therefore, this Court has been left with no option but to set aside the certificate proceeding on the ground, as indicated above, in so far as the petitioner is concerned. The certificate proceeding would continue as against the rest.

15. The writ petition is thus allowed and the certificate proceeding as against the petitioner being Certificate (Misc.) No. 17/04-05 pending before the Certificate Officer, Patna, is quashed. The writ petition is allowed.

