

(2007) 08 PAT CK 0061

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 483 of 2004

Dr. (Capt.) Akhouri Ramesh Chandra Sinha

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 24-08-2007

Acts Referred:

Bihar Pension Rules, 1950 — Rule 43B
Constitution of India, 1950 — Article 166

Citation : (2008) 56 BLJR 354

Hon'ble Judges : Sudhir Kumar Katriar, J

Bench : Single Bench

Advocate : Shreekant Pandey, for the Appellant; S.K. Ghosh, A.A.G. II, for the Respondent

Judgement

S.K. Katriar, J.—This writ petition is directed against notification No. 237(9), dated 20.2.2004 (Annexure 7), whereby the punishment of deprivation of pension to the extent of 100% in terms of Rule-43(b) of the Bihar Pension Rules (hereinafter referred to as "the Rules") has been imposed on the petitioner, and to set aside the entire departmental proceeding with consequential benefits. The respondents have placed on record their counter affidavit and have opposed the writ petition.

2. According to the writ petition, the petitioner was, during the period 1996 to June 2001, posted in the Directorate of Health Services, Government of Bihar, and superannuated with effect from 30.6.2001 while he was functioning as Director of Health Service. He was served with charge-sheet No. 11.62 (B), dated 31.12.2001 (Annexure 1), whereby five charges were levelled against him. The State Government had issued a modified resolution No. 37(3), dated 16.1.2002 (Annexure 1/A), whereby the Enquiry Officer and the Presenting Officer were appointed. The petitioner submitted his cause in the nature of written statement before the learned Enquiry Officer on 19.2.2002 and 23.2.2002. After conclusion of the enquiry, the learned Enquiry Officer submitted

his report dated 12.9.2003 (Annexure 3), recommending deprivation of pension to the extent of 10%. Show-cause notice dated 10.12.2003 (Annexure 4) was issued as to why he be not deprived of his entire pension. The petitioner had shown cause on 27.12.2003 (Annexure 6), leading to the impugned order.

3. While assailing the validity of the impugned order, learned Counsel for the petitioner submits that the proceedings were instituted without the sanction of the State Government and is, therefore, hit by proviso (a)(i) of Rule 43(b) of the Rules. He relies on the following reported judgments:

(i) 1995 (2) PLJR SC 51

State of Bihar v. Md. Idris Ansari

(ii) 2002(2) PLJR 845 (para 10)

Rajniti Jha v. State of Bihar

Para-10

Charge Nos. 1 and 2 relate to the period prior to four years from the date of the service of the charge-sheet and is, therefore, hit by proviso (a)(ii) to Rule 43(b) of the Rules. The proceeding is also hit by proviso (c) to Rule 43(b), because the Bihar Public Service Commission was not consulted before final orders were passed. The petitioner was never noticed to appear before the learned Enquiry Officer to present his defence. The entire proceeding has been concluded on the basis of his written statement. He further submits that out of five charges, two were not at all proved and three were partially proved which are inconsequential in nature. He has, in fact, gone to the extent of submitting that the finding to that extent is not borne out by materials on record. The Department did not produce any witness to prove the charges. The punishment is disproportionate to the gravity of the charges alleged to have been proved. He lastly submits that the learned enquiry officer has noticed the factual position that his son died, his wife is a mental case, and he has, therefore, retreated to his ancestral home.

4. Learned government counsel submitted that the first charge was served with respect to an incidence of 27.8.96, the charge-sheet was served on 27.7.99, within a period of four years. The period of limitation will be deemed to have been arrested, and the service of subsequent charges will not be hit by the law of limitation. Reliance was placed on the judgment reported in 2006 (2) PLJR 11 (Para 10) Tripurari Sharan Singh v. State of Bihar and Ors.. He also placed reliance on the judgment of the Supreme Court in the case of State of Bihar v. Md. Idris Ansari (supra) in an effort to establish that the period of four years is counted backwards from the date of service of charge-sheet which, in the present case, was served on 27.8.96. The proceedings were initiated under orders of the Governor of Bihar and in full compliance of Article 166 of the Constitution of India. Full opportunity was given to the petitioner to present his defence before the learned Enquiry Officer. Consultation with the Commission is not a mandatory provision of law. He relies on the judgment reported in 2007(1)

PLJR 315 Ram Jatan Prasad v. State of Bihar (Para 9). He lastly submits that appropriate punishment has been imposed.

5. I have perused the materials on record and considered the submissions of learned Counsel for the parties. The first Submission on behalf of the petitioner is that the enquiry was not instituted with the sanction of the State Government. Proviso (a)(i) to Rule 43(b) provides that such proceeding shall not be instituted without the sanction of the State Government. It appears to me on a perusal of the materials on record that the resolution of the State Government of 31.12.2001 (Annexure 1), instituting the proceeding under Rule 43(b), was issued in the name of the Governor of Bihar enclosing thereto a copy of the charge-sheet. The order dated 16.1.2002 (Annexure 1/A), appointing the Enquiry Officer and Presenting Officer, has also been issued in the name of the Governor of Bihar. The impugned order of punishment has also been issued in the name of the Governor of Bihar. It is thus manifest that the proceedings under Rule 43(b) was instituted with the sanction of the State Government. The contention is rejected.

6. The petitioner's second contention is that the first two charges are hit by the bar of limitation engrafted in the proviso (a)(ii) to Rule 43(b). Proviso (a)(ii) to Rule 43(b) provides that such departmental proceedings shall be in respect of an event which took place not more than four years before the institution of such a proceeding. It appears that the event with respect to the first charge had taken place on 27.8.96, the event with respect to second charge on 15.5.95, the petitioner superannuated with effect from 30.6.2001, and the charge-sheet is dt. 31.12.2001 (Annexure 1). Explanation "A" to Rule 43(b) provides that, for the purpose of the rule, departmental proceeding shall be deemed to have been instituted when the chargee framed against the petitioner are issued to him, if the government servant is placed under suspension from an earlier date. on such date. The first two charges are obviously hit by the bar of limitation engrafted in Rule 43(b), and the proceeding could not have been instituted with respect thereto. The contention is upheld.

7. The petitioner's third contention is that he was never noticed to appear in the enquiry proceeding, the State Government never produced any witness in support of its case, and the documents considered by the learned Enquiry Officer were never brought on record. The respondents have not placed on record any material to satisfy the court that the learned Enquiry Officer had issued any notice to him informing of the date(s) fixed in the enquiry proceeding and to appear in support of his defence, nor does the enquiry report anywhere indicate that such a step was taken by the learned Enquiry Officer. The following portion occurs in the enquiry report:-

4- mi;qZDr ds vkyksd esa Mk0 fUgk }kjk nks vyx&vyx fyf[kr c;ku lefiZr fd;k x;k gS] tks fnukad 19&2&2002 ,oa 23&2&2002 dk gS A ,d vU; c;ku tks 15-7-2002 dks izkIr gqvk dk Ik`0 167@i0 ij voyksdu fd;k tk ldrk gS A

5- Mk0 fUgk }kjk dqN vfHkys[kks dh ekWax dh x;h Fkh] os IHkh vfHkys[k foHkkxh; i= 907 ?3? fnukad&17-7-2002 ls miyC/k djkh nh x;h gSA

mijksDr IHkh vfHkys[kks dk voyksdu fd;k x;k A

Equally, the enquiry report does not refer to any witness of the State Government, nor mentions exhibit number of any document.

7.1 The learned Counsel for the petitioner is, therefore, right in his Submission that the Enquiry Officer did not afford him an opportunity to appear during the course of the proceeding, the State Government did not produce any witness to prove the charges, nor any document was marked exhibit. The entire enquiry report seems to be based on a perusal of the two show-cause notices to the petitioner, the written statements submitted by him, and also on a perusal of certain documents which did not form part of the proceeding. The enquiry proceeding was in serious violation of the basic principles of natural justice and as a whole stands vitiated.

8. This takes me on to another vital aspect, of the matter, namely, the findings recorded by the learned Enquiry Officer. He has held that charge Nos. 1 and 4 have not been proved.

8.1 Charge No. 2 reads as follows:

?2? vkjksi la0&2 ?nks? & MkW0 vk[kkSjh i=kad&907 ?22? fnukad 15-5-95 }kjk foRr lfpo dks i= fy[kk] ftles ;g xyr c;kuh dh gS fd ?d? ngedk ltsZUIh varxZr funs"kk; ds tkap ny ls tkap djkh x;h Fkh rFkk tkap fo"ks"k vads{k.k ny ls ljdkj dk djkus dk vkns"k gS] tcfd ;s nksuksa ckrsa xyr gS A tkap ny ds ,d ny ls vf/kd ink0 gksrs gSa tcfd bl ny esa vkids flok dksbZ vkSj ugha Fkk rFkk ljdkj ls fo"ks"k vads{k.k ny ls tkap djkus lECU/kh dksbZ vkns"k lapdk ij izkIr ugh Fkk A

The learned enquiry officer has held that it has been partially proved. It relates to the scam with respect to supply of medicines by a supplier and had come to be known as MSD Scam. It appears from a perusal of the enquiry report that it was the petitioner who had exposed the scam and had submitted his preliminary enquiry report to the Health Commissioner recommending detailed enquiry/ investigation. The charge is, and perhaps the Enquiry Officer has partially found it to be true, that he had in his Communication to the Finance Commissioner adverted to an audit report which was not found in the file. It appears to me in the totality of the circumstances that even if it is accepted to be true that he had inadvertently mentioned an audit report in one of his correspondence which was not found there, the same can not implicate the petitioner. There is no indication in the enquiry report that the petitioner had misused or misquoted the audit report, nor is there any finding that it interfered with the detailed enquiry/ investigation of the same, nor is there any indication that the letter to the Finance Commissioner formed part of the instant enquiry proceeding. It can at best be stated that the petitioner had inadvertently mentioned a non-existent audit report which did not cause any prejudice to the government functioning.

The respondent authorities have completely failed to realise the petitioner's sincerity that it was he who had exposed the scam, did conduct the preliminary enquiry, and had submitted his report to the Health Commissioner for detailed enquiry, and the learned enquiry officer has acknowledged it. I would, therefore, conclude that in view of the materials on record, charge No. 2 has not been proved.

8.2) Charge No.3 reads as follows:

3? ifj/kkidksa dh fu;qfDr%& funs"kky; Lok0 Isok,W] fcgkj] iVuk fd vkns"k la0 & 572 ?4? fnukad 22&6&2001 }kjk fofHkUu laLFkkuksa esa ifj/kkidksa dh fu;qfDr dh x;h A bl fu;qfDr eas fcgkj ljdkj }kjk le; & le; ij fuxZr vkns"kks dk vuqikyu ugha gqvk gS%

?d? vodk"k izkfIr ds vafre ekg esa fu;qfDr dh dk;Zokgh dh x;h tcfd vki fnukad 30-6-2001 dks Isok fuo`Rr gks jgs Fks A

?½ inksa dk foKkiu ugha fd;k x;k Fkk] tks Hkkjrh; lafo/kku ds vuqPNsn&16 ds varxZr vko;"d gS A

?x? fu;qfDr esa vkj{k.k ds fu;eksa dk vuqikyu ugha fd;k x;k gS A ,DV 1991 ds fu;eksa dk vuqikyu ugha gksuk ,d vijk/k gS A

?? IkzR;k"kh;ksa ds tUe frfFk@izek.k&i= dh tkap ugha dh x;h A cgqr ls izR;k"kh dh mez fu/kkZfjr lhek ls vf/kd Fkh] dk mez Kkr fd;k x;k] tks vkids vf/kdkj {ks= esa ugha Fkk A

?M+? p;u lfefr dk xBu ugha fd;k x;k rFkk vius Lrj ls gh fu;qfDr dh lkjh dk;Zokgh dh x;h] tks xyr gS A

?p? foHkkxh; Kkaikd& 319?4? fnukad& 5&6&76 }kjk funs"kd izeq[k gh fu;qfDr inkf/kdkjh gSa] funs"kd ugha gS vr% funs"kd ds }kjk dh x;h fu;qfDr loZFkk xyr gS A

?N? foRr foHkkx ds i=kad& 4675 fnukad& 2-7-98 ds vkyksd esa uu&Iyku ds v/ khu tks in N% ekg ls fjDr gS] ml ij fu;qfDr foRr foHkkx@eq[;ea=h dh lgefzr izkIr dj gh djuk Fkk bldk vuqikyu ugha fd;k x;k gS A

The learned enquiry officer has held that it has been partially proved. As to charge No. 3, the learned Enquiry Officer has found that appointment letters of Dressers were issued in the last month of his service. The learned Enquiry Officer has found that the appointment letters were so issued on the basis of the direction issued by the Health Minister. It is thus manifest that the petitioner had carried out the orders of the superiors, in fact the State Government, and can not be held guilty for the same, particularly in a situation where there is no allegation of collusion or ulterior motives. Learned Counsel for the petitioner is right in his Submission that refusal to carry out the order would have resulted in a similar proceeding for disobedience of the order of the superiors. The petitioner's objection has been duly noticed by the learned Enquiry Officer and reads as follows:

;s fu;qfDrka rRdkyhu foHkkxh; ea=h Jh "kdquh pkS/kjh rFkk rRdkyhu foHkkxh; lfpo Jh lsB rFkk jkT; ds lHkh "kh"kZ inkf/kdkjh ds cSBd es fy, x, fu.kZ; ds dze esa fd;k x;k A funs"kd ds vkifRr ij gh fd dksbZ fu;qfDr ekSf[kd vkns"k ij ugh fd;k tk;sxk] rc foHkkxh; ea=h }kjk fu;qfDr djus ds fy, ihr i= ij Li"V funs"k izkIr gqvk gSA

(Emphasis added)

No material has been brought to my notice that the Bihar Government has taken any action against the Health Minister for issuing direction to the petitioner to issue appointment letters which were illegal or irregular. We say no more because the Health Minister is not a party respondent herein. The State Government has made the petitioner a scape-goat. In this situation, the petitioner cannot be held guilty of issuing the appointment letters because the same were issued at the behest of the Minister.

The learned Enquiry Officer has held that "Aarop aanshik rup se pramanit paaye jaate hay", does not flow from the materials before him and the discussion in the enquiry report. The learned Enquiry Officer has found as follows:

?d? jkT; ljdkj dk lsok fuo`Rr ds iwoZ fu;qfDr ugha djus dk dksbZ ifji= ugha ik;k x;k A vr% vkjksi vizekf.kr ik;s tkrs gS A

?½ ;lfi ;g lR; gS fd fu;qfDr LokLF; e=ah ds ihr i= ij fn;s x;s funs"k ds vkyksd es gqvk ijUrq fu;qfDr ds iwoZ foKkiu ugh fd;s tkus dk vkjksi izekf.kr ik;k tkrk gS A

8.3) Charge No. 5 appears to me to be rather vague. Inadvertently describing a hospital as a government hospital perhaps can not constitute a charge, particularly in a situation where there is no allegation that the petitioner was himself to benefit, or intended somebody el se to benefit, from such an action. In fact, the learned Enquiry Officer has himself observed that that it was a "Prakriyatmak Bhool" (procedural error), and deemed to have been partially proved. In view of the materials before the learned Enquiry Officer and the discussion in the enquiry report, I am of the view that the same does not lead to the conclusion that the charge has been partially proved.

8.4) On a careful perusal of the enquiry report, I am of the view that none of the charges has been proved and the petitioner seems to have been made a scape-goat. It is apparent on the face of it that some forces in the State Government were working against him and were determined to ensure punishment to him. The State Government did not spare any effort to ensure that the petitioner was thoroughly punished, and the saving grace is the fair approach of the learned enquiry officer, although the enquiry proceeding suffers from serious procedural irregularities which has acted to the grave prejudice of the petitioner.

9. Learned Counsel for the petitioner has submitted that the Commission was not consulted before the final order was passed and is, therefore, hit by proviso (c) to Rule 43(b).

Learned Govt. Counsel has relied on paragraph 9(1) of the judgment in the case of Ram Jatan Prasad (supra), and reproduced hereinbelow:

9.1. Proviso (c) to Rule 43B is not mandatory in nature, and its non-compliance does not vitiate the impugned punishment. In view of the discussion in the judgment of this Court in the case of Shambu Nath Bhagat v. State of Bihar (supra), I am relieved of the responsibility of discussing the issue in details. Relying on the judgment of the Supreme Court in the case of State of U.P. v. Manbodhan Lal reported in AIR 1957 SC 012, this Court held as follows in paragraph-9 of the judgment:

9. In the instantx also, the power to impose punishment is vested in the Government under Rule 43(b) of the Rules and cannot be held to be, in any way, controlled by the provisions contained in Clause (c) which requires consultation with the Commission before passing of the final order as it does not provide for the contingency as to what is to happen in the event of non-compliance of the said requirement. It does not either in express terms or by implication provide that the result of which a non-compliance is to invalidate the proceedings ending with the final order of the Government. Under such circumstances, it is difficult to uphold the contention of the learned Counsel for the petitioner that the impugned order shall stand vitiated on account of non-compliance of the provisions contained in Clause (c) of proviso to Rule 43(b) of the Rules.

It has thus been held that the provision is not mandatory. It does not follow that the provision should necessarily be followed in its breach. Non-observance of the provision in the present case may not vitiate the proceeding, but is surely a circumstance against the respondents showing lack of bona fides, and the determination to inflict punishment. Some forces were surely working against the petitioner in a determined manner, were out to ensure his destruction, and purposely wanted to avoid the scrutiny of an impartial body like the BPSC, particularly in a situation where the learned Enquiry Officer recommended for deprivation of pension to the extent of 10%. Even if one were to agree with the learned AAG that the learned Enquiry Officer should not have recommended the quantum of punishment, but that does show the perception of the learned Enquiry Officer of the materials before him who was in full seisin of the matter. Refusal to consult the Commission appears to be purposive on the part of the respondent authorities who have exposed themselves to the risk of adverse inference.

10. The petitioner's last Submission is that the punishment is seriously disproportionate to the gravity of the charges deemed to have been proved. Law is well settled that determination of punishment in pursance of a validly conducted departmental proceeding is primarily an executive function. This Court, in exercise of its powers of judicial review, has limited powers of interference. The Court can interfere only if the punishment is seriously disproportionate to the proven charges and shocks the conscience of the court. In view of the discussion hereinabove, the irresistible conclusion is that no

opportunity at an was afforded to the petitioner to appear during the course of enquiry proceeding, he was not aware of the proceedings before the learned enquiry officer, which was decided entirely on the basis of the show-cause notices, written statements and some of the documents of the files of the concerned departments which did not form part of the enquiry proceeding. The State Government did not produce any witness to prove the charges, nor the documents were validly brought on record. No document has been marked as exhibit. Therefore, the enquiry proceeding was concluded in utter disregard of the basic principles of natural justice, and stands vitiated. None of the charges have been held to have been proved. No punishment at all can be inflicted on the petitioner. The petitioner's case in that sense is really not covered by the exception clause that the punishment is disproportionate, the enquiry proceeding being a nullity. I, therefore, need not detain myself to consider the petitioner's grievance that the punishment is disproportionate to the gravity of the charges. Even if the findings recorded by the learned Enquiry Officer that three of the charges have been partially proved are taken on their face value, the same being undoubtedly inconsequential, it does not merit any punishment at all.

11. In the result, the enquiry proceeding as well as the impugned order of punishment dated 20.2.2004 (Annexure 7) are hereby set aside. The petitioner shall be entitled to pension and other post-retirement benefits, if any, in full and in accordance with law which shall carry interest @12% (twelve) from the date the amounts became due till the date of payment. He shall also be entitled to costs of this writ petition quantified at Rs. 10,000/- (ten thousand).