

(2013) 10 PAT CK 0059

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 17822 of 2012

Dr. Janak Lali Sinha

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2014) LabIC 1448

Hon'ble Judges : Mihir Kumar Jha, J

Bench : Single Bench

Judgement

Mihir Kumar Jha, J.—Heard learned counsel for the parties as with regard to the following relief prayed in this writ application: For quashing of memo No. 671 (9) Health Patna dated 12.5.2005 issued by the Joint Secretary of Government of Bihar contained Annexure 8 by which the petitioner has been awarded three punishments namely warning, stoppage of two annual increments with non-cumulative effect and no payment of salary during suspension period and also quash memo No. 900(9) Health Patna dated 19.7.2012 by Deputy Secretary of Health Department, Patna contained in Annexure 10 by which rejected review application dated 11.6.2011 of the petitioner.

Mr. Ashok Kumar Jha, learned counsel appearing on behalf of the petitioner, in support of the aforementioned prayer has submitted that the impugned order imposing punishment of stoppage of two increments as also non-payment of salary beyond subsistence allowance for the period of suspension is primarily unsustainable because it is a non-speaking order which does not give any indication of application of mind on the specific defence of the petitioner. Expanding the aforesaid submission he has tried to highlight that a mere absence of the petitioner from duty on one day i.e. 14.5.2003 could not have led to such a harsh punishment of stoppage of two increments as also denial of payment of salary beyond subsistence allowance for the entire period of suspension. He has also in this regard referred to the documents on record to show that the petitioner's absence only on one day was also for a valid reason, inasmuch as

she was ill and was being treated at Munger for which the information was also given by the petitioner to her controlling officer. Mr. Jha in this regard has also relied on an order of this Court dated 14.2.2011 in C.W.J.C. No. 14474/2005 (Dr. Raj Kumar Chaudhary v. the State of Bihar & Ors.) wherein a similar punishment for the same misconduct was found to be unsustainable by this Court. 2. Per contra, learned counsel for the State has supported the impugned order of punishment by referring to the materials on record and his main limb of submission is that the petitioner was found absent from duty without there being any prior information given with regard to her so called illness and that the information which was given by her was only after sudden inspection was held by the Cabinet Minister of Health. He has also submitted that the so called plea of illness of the petitioner was required to be proven by her but from the materials on record it was more than clear that she had failed to even prove her such illness. He has also, while justifying the impugned order of punishment, referred to the enquiry report to demonstrate that the Enquiry Officer had failed to take into consideration that there was no prior information of the petitioner being ill and her being not in a position to attend her work in the Government Dispensary on 14.5.2003 and thus the disciplinary authority deferring with such finding of enquiry and giving notice to the petitioner had held her guilty of the misconduct of her being unauthorised absent from duty. In this regard he has sought to distinguish the case of Dr. Raj Kumar Chaudhary (supra) by explaining that in his case a finding could be arrived at that there was prior information of his remaining absent from duty.

3. In order to appreciate the aforesaid rival submissions of both the parties it would be necessary to take stock of some of the relevant facts. The petitioner is a lady doctor who at the relevant point of time was posted in Referral Hospital at Barahiya in the district of Lakhisarai. In all there were five doctors posted in the Referral Hospital but when a sudden inspection was carried out by the Cabinet Minister of Health on 14.5.2003 at 10 a.m. the whole hospital was found to be closed with none of the doctors to be present on their duty. As a result of the said sudden inspection the petitioner and four other doctors, namely, Dr. Arun Kumar, Dr. Raj Kumar Chaudhary, Dr. Hari Sharan Sinha and Dr. Sheela Jha, were placed under suspension by an order dated 14.7.2003. It is not in doubt that a departmental proceeding was also initiated in respect of the following charges against the petitioner:

(Vernacular matter omitted.... Ed.)

4. The petitioner had appeared before the Enquiry Officer and had raised the following pleas in her defence:

(Vernacular matter omitted.... Ed.)

(Underlining for emphasis)

5. The departmental enquiry was thereafter conducted and the Enquiry Officer in his enquiry report had recorded the following finding:

(Vernacular matter omitted.... Ed.)

6. From the reading of the enquiry report and specially its aforesaid extracted portion it would be very clear that even when the Enquiry Officer had found the charge of the petitioner being absent from duty on 14.5.2003 in course of sudden inspection of the Cabinet Minister of Health to be proved he had virtually tried to hush up the matter by recommending that her absence on 14.5.2003 could be condoned by allowing her to avail casual leave for that day and she could be exonerated from the charge.

7. It was in this background that the disciplinary authority, namely, the State Government had differed with the finding given in the enquiry report and the petitioner was given an opportunity to explain as to why she should not be held guilty for the charges framed against her. The relevant part of the show-cause notice differing with the enquiry report dated 28.5.2004 reads as follows:

(Vernacular matter omitted.... Ed.)

8. The petitioner in her show-cause reply dated 1.6.2004 had sought to explain her absence on 14.5.2003, the relevant part of her explanation dated 1.6.2004 reads as follows:

(Vernacular matter omitted.... Ed.)

(Underlining for emphasis)

9. The impugned order in fact has been passed on 12.5.2005 after considering the aforementioned show-cause reply of the petitioner, whereby and whereunder apart from censure and stoppage of two increments with non-cumulative she has been also deprived of her payment of salary beyond subsistence allowance for the period 14.7.2003 to 12.5.2005. It is important to note here that against the said order of punishment the petitioner had filed her review application and in the same she had placed reliance on the order of this Court in the case of Dr. Raj Kumar Chaudhary. The said review application was considered and rejected by the State Government by an order dated 19.7.2012 and the same was rejected by giving reasons primarily on the ground that she had not obtained prior permission of remaining absent from duty from the competent controlling authority.

10. It is in this factual scenario that this Court will have now to examine the submission of Mr. Jha, learned counsel for the petitioner. First of all it has to be noted that the petitioner has not complained with regard to any procedural infirmity in the departmental proceeding. In fact in the entire writ petition the emphasis of the petitioner is on the merit of the charge. Mr. Jha, learned counsel appearing on behalf of the petitioner, has also confined his submission on the merit of the charge.

11. Normally this Court having found that there was no challenge to the procedure adopted in the departmental proceeding and the petitioner was given

reasonable opportunity to defend herself both before the Enquiry Officer and before the appointing authority it was not required to go into the merits of the charge, inasmuch as by-now it is well settled that this Court while exercising power under Article 226 of the Constitution of India in the disciplinary proceedings is not required to sit in appeal over the decisions taken by the authority. Reference in this connection may usefully be made to the judgment of the Apex Court in the case of B.C. Chaturvedi Vs. Union of India and others, .

12. This Court, however, keeping in view that the Enquiry Officer had somehow given a vague and double edged finding, inasmuch as in the top portion of the discussion he had held charge against the petitioner to be proved and yet in the concluding portion he had recommended for grant of one day Casual Leave to the petitioner and also had recommended for exonerating the petitioner, it has carefully perused the materials on record. This Court would find that initially when the petitioner had filed her show-cause reply she had never taken a plea that on 13.5.2003 that as because she was allegedly having her severe menses problem at Barahiya, she had even cared to inform anyone much less had obtained permission before leaving her headquarters. Her explanation in this regard in fact in the written statement of defence filed by her before the Enquiry Officer, as quoted above, was that on account of gynecological problem she had left her place of posting and only after she came to know at Munger about sudden inspection of the Cabinet Minister of Health at Barahiya on 14.5.2003 she had sent an application for special leave on 14.5.2003. This fact would be also evident from the quoted portion of her explanation which for the sake of clarity has also been underlined.

13. Thus, from her aforesaid explanation two things became clear. Firstly, she had left the headquarters at Barahiya without taking any prior permission from her controlling authority which by itself is a misconduct for a Gazetted Officer and that too a Medical Officer posted in Referral hospital. Secondly, if she was ill and there were only two lady doctors posted in the Referral hospital she had to take prior permission of her controlling authority so as to enable the Referral hospital to function on 14.5.2003. There is however nothing on record that the petitioner had left Barahiya even by way of applying for leave before going to Munger. In that view of the matter, when she had also admitted that her application for leave was followed only after acquiring information of sudden inspection of the Cabinet Minister of Health this Court will have no difficulty in holding that the finding of the disciplinary authority that she was unauthorizedly absent from duty does not suffer from any error.

14. It is at this stage that one has to look her defence taken subsequently before the disciplinary authority in response to the show-cause notice differing with the enquiry report. Surprisingly the same person who in her written statement of defence had admitted to have sent her first information regarding special leave only by-post on 14.5.2003 after sudden inspection of the Cabinet Minister of Health had changed her stand in her show-cause reply dated 1.6.2004 wherein

she had claimed that she had left Barahiya for her treatment at Munger after filing her application for leave on 13.5.2003. This portion of her defence has also been extracted above and underlined by this Court for appreciating the total U-turn. The petitioner had also not enclosed copy of any such application dated 13.5.2003 in her reply before disciplinary authority the same was produced by her even before the Enquiry Officer in the list of documents. As a matter of fact copy of such application for leave dated 13.5.2003 has also not been enclosed with this writ application. In fact if the petitioner had to prove this aspect she had to examine the Civil Surgeon cum Chief Medical Officer, Lakhisarai to whom she claimed to have filed her application on 13.5.2003 before leaving the headquarters at Barahiya. In any event when the petitioner herself had admitted in her written statement filed before enquiry officer to have left Barahiya at 4 p.m. on 13.5.2003 without there being any mention of her filing application before the Chief Medical Officer cum Civil Surgeon, Lakhisarai on 13.5.2003 her subsequent plea raised in her show-cause reply dated 1.6.2004 has to be disbelieved, especially when the said document had also never been brought on record by the petitioner even before the disciplinary authority in her reply to show-cause notice.

15. Thus, even on merit this Court does not find any error in the ultimate decision arrived by the disciplinary authority that the petitioner was found absent from duty on 14.5.2003 in course of sudden inspection of the Cabinet Minister of Health and that her absence was unauthorized because she had not been sanctioned leave.

16. The submission of Mr. Jha that the petitioner's one day unauthorized absence should not have been viewed so seriously so as to subject her with the punishment of both censure as also stoppage of two increments (without any cumulative effect) apart from non-payment of salary for the period of suspension has to be actually viewed from the angle of duty which was to be performed by the petitioner. The petitioner was herself a lady doctor posted in a Referral hospital in Barahiya where a large number of lady patients had to be attended and therefore, if the lady doctor herself would become absent from duty without prior information that cannot be viewed to be a minor misconduct. The State Government when it seeks to achieve the service of the Medical Officers by posting them in the rural area and semi urban area, its main emphasis is on the quality and punctual health services of the Medical Officers to be made available to the general public. If the doctors themselves start remaining absent from the hospital the life of the helpless and poor people is itself put at stake. Viewed from the aforesaid angle it cannot be said that the petitioner was not guilty of a grave misconduct, being unauthorized absent from duty and that too of a doctor which is a grave misconduct. The petitioner should treat herself fortunate that she had escaped with a rather lenient punishment of censure and stoppage of only two increments without any cumulative effect. The doctrine of proportionality of punishment has also to be left in the hands of the disciplinary authority and this Court in exercise of power under Article 226 of the

Constitution of India cannot weigh the evidence for reducing punishment which was inflicted against the petitioner as has been repeatedly held by Apex Court and this Court including in the case of B.C. Chaturvedi Vs. Union of India and others, and in the case of Om Prakash Sah Vs. The State of Bihar and Others .

17. The reliance placed by Mr. Jha on the order of this Court in the case of Dr. Raj Kumar Chaudhary (supra) is clearly distinguishable on facts, inasmuch as this Court had noted that Dr. Raj Kumar Chaudhary had filed an application for permission to leave the headquarters and given information to the In-charge Medical Officer of his remaining absent from duty on 14.5.2003. In fact this Court had also gone to examine the said aspect while holding that the in-charge Medical Officer had not been examined nor had he denied that Dr. Raj Kumar Chaudhary had not filed the application. In view of the aforementioned clear distinction on facts in the case of Dr. Raj Kumar Chaudhary (supra) and the facts of the petitioner as discussed above, this Court will find that the order dated 14.2.2011 in C.W.J.C. No. 14474/2005 (Dr. Raj Kumar Chaudhary v. the State of Bihar & Ors.) will not be applicable to the facts of the present case.

18. As a matter of fact this aspect of the matter has also been clearly explained by the respondents in their counter affidavit in paragraph Nos. 10, 13, 14 and 15 of the counter affidavit which reads as follows:

10. That the statements made in paragraph Nos. 7 to 12 are matters of record and require no comment from the deponent barring the fact that in her show cause, the petitioner was admitted that she was absent on the day of inspection and that she had sent her application for leave for 14.5.2003 only by post from Munger and has not stated in her show-cause that she had taken prior leave or permission.

13. That the statement made in paragraph No. 15 are not correct and hereby denied. It is stated that the present is a case wherein the delinquent officer has admitted the guilt and has raised a precarious defence. It is further stated that there was sufficient material on record to impose the minor punishment against the petitioner and the proceeding cannot be said to be vitiated merely because the presentation officer was not examined *in toto* in view of the fact that unlike the case of Raj Kumar Chaudhary it is not the case of the petitioner that she had informed the In-charge Medical Officer or the Civil Surgeon before proceeding on leave.

14. That the averments made in paras 16 and 17 require no comment barring the fact that the case of the petitioner in C.W.J.C. No. 14474/2005 was different from the case of the petitioner herein.

15. That so far the statements made in paragraph No. 18 are concerned, it is stated that the Review application of the petitioner was rejected vide memo No. 900(9) Health, Patna dated 19.7.2012 by the under Secretary of Health Department, Govt. of Bihar, Patna after thorough application of mind and also by giving reasons for rejection of the same so far as the averment made in the

second part of paragraph 18 is concerned it is stated that no similarity can be drawn with the case of Dr. Raj Kumar Chaudhary in C.W.J.C. No. 14474/2005 as in the said case Dr. Chaudhary had altogether a different explanation/reason against his unauthorized absence from that of the petitioner as it is not the case of petitioner, herein that she had given prior information before leaving for Munger. Thus, so such there cannot be any question of any violation of natural justice or Article 14 of the Constitution of India.

19. It has to be kept in mind that though copy of the counter affidavit was served on the learned counsel for the petitioner on 1.3.2013 the same has also not been controverted and infact the all important document, the so called application filed by the petitioner on 13.5.2003 before the Civil Surgeon cum Chief Medical Officer, Lakhisarai claiming leave before leaving Barahiya has not been produced even when the respondents have sought to distinguish the case of the petitioner with that of Dr. Raj Kumar Chaudhary on this ground alone.

20. In the light of the aforementioned discussions, this Court will have no option but to hold that the impugned order so far it visits the petitioner with punishment of censure and stoppage of two increments without any cumulative effect does not suffer from any error.

21. That would bring this Court to the last question as with regard to validity of the impugned order of punishment so far it relates to denial of salary beyond subsistence allowance for the period of suspension. Admittedly, the impugned order of punishment was passed on 12.05.2005 when the old Civil Services (Classification, Control and Appeal) Rule, 1930 was in force, inasmuch as, the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 came into force on 12-07-2005. Under the old 1930 Rules suspension itself was punishment in terms of Rule-49(V) which had specifically contained suspension as a penalty. This Court in the case of Chandrika Mochi Vs. State of Bihar and Others, had held that the question as to what salary a person would be entitled for the period of suspension upon completion of the departmental proceeding was required to be determined in terms of Rule -97 of the Bihar Service Code(hereinafter referred to as the Code). It was further held therein that if the person is fully exonerated from the charges normally, full salary is to be allowed and conversely if he is found guilty and inflicted punishment, the competent authority may pass order for payment of salary and/or deny full salary for the period of suspension except subsistence allowance. To that extent having regard to the law laid down in the case of Chandra Mohan (supra), this Court does not find any error in the impugned order denying the petitioner payment of salary for the period of suspension beyond subsistence allowance, inasmuch as, the charges against the petitioner had stood proved and she had been inflicted punishment of both censure and stoppage of two increments of course without any cumulative effect which would make it a case of minor punishment.

22. The only flaw in such order of punishment of withholding salary beyond subsistence allowance, however, is that the petitioner was not given notice in

terms of Rule-97(3) of Bihar Service Code which was held to be mandatory by this Court in the case of Shri Mahabir Prasad Vs. The State of Bihar and Others, , wherein, this Court had held that after awarding minor penalty of censure the delinquent in the event of being also denied the payment of salary and allowances for the period of suspension beyond subsistence allowance was entitled to a liberty to show-cause as to why provision made in Rule 97(3)(5) should not be applied. In view of the fact that the impugned order is a compact and common order inflicting all the three punishments namely, censure and stoppage of two increments (without cumulative effect) as well as withholding of payment of salary beyond subsistence allowance, it has to be held that Rule-97(3) (5) of Bihar Service Code were not followed while inflicting her punishment of withholding of salary beyond subsistence allowance. The impugned order therefore, so far it relates to withholding of salary beyond subsistence allowance in absence of a notice to the petitioner in terms of Rule-97(3) (5) of the Code has to be essentially held to be bad.

23. Thus while approving the impugned order of punishment of the petitioner so far it relates to censure and stoppage of two increments (without cumulative effect) this Court would set aside that part of the impugned order where the payment of salary beyond subsistence allowance had been withheld.

24. Having held so that the impugned order is bad in absence of notice under Rule-97(3)(5) of the Code, this Court would remit the matter back to the disciplinary authority to now issue notice to the petitioner in terms of Rule-97(3) (5) of the Code giving her an opportunity to file her show-cause reply as to why in view of the order of punishment of censure and stoppage of two increments on account of the charges being proved against her, she should also not be deprived of payment of salary beyond subsistence allowance for the period of suspension. Such exercise must be completed in the case of the petitioner by the disciplinary authority within a period of six months from the date of receipt of this judgment.

25. Thus in the result, this application succeeds only in part and the impugned order of punishment dated 12.05.2005 so far it relates to inflicting punishment of withholding of salary beyond subsistence allowance for the period of suspension of the petitioner is set aside with a direction to issue show-cause notice to the petitioner in terms of Rule-97(3)(5) of the Code and take a final decision upon submission of her show-cause reply, if any, within a period of six months from the date of receipt of this judgment. It is, however, made clear that if such order in terms of Rule 97(3)(5) of the Code is not passed by the State Government despite the petitioner filing her show-cause reply within a period of six months from the date of receipt of this judgment. The respondents shall be permanently precluded from denying the payment of salary for the period-of suspension to the petitioner. In other words if no show-cause notice and/or final order in terms of Rule 97(3)(5) of the Code is passed within the aforementioned period of six months, the petitioner will be entitled for payment of her full salary for the period of suspension i.e. from 14.07.2003, the date on which the order of

suspension was passed to 12.05.2005, the date of passing of the impugned order of punishment. With the aforementioned observations and direction, this application is disposed of.