

(1987) 09 PAT CK 0028
In the Patna High Court
Case No : C.W.J.C. No. 2095 of 1980

Dr. Lakshmi Narain Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-09-1987

Acts Referred:

Penal Code, 1860 (IPC) — Section 161

Citation : (1989) 37 BLJR 58

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Judgement

Lalit Mohan Sharma, J.—On a difference of opinion between Mr. Justice H. L. Agrawal (as he then was) and Mr. Justice M. P. Varma, on one of the questions involved in the present writ application, the case has been referred to me. The petitioner retired from State service on 31-3-1979 as a Civil Assistant Surgeon. A disciplinary proceeding was started against him many years back and he was put under suspension, and was allowed to draw subsistence allowance under Rule 96 of the Bihar Service Code. The proceeding had a chequered history. After the petitioner, filed his show cause he was served with another show cause notice with reference to a second proceeding in regard to the same charges. On receipt of the enquiry report, the State Government by Annexure-22, found the petitioner guilty and imposed on him the punishment of "one censor, stoppage of three increments, his absence from duty for about a year and 10 months" to be treated as break in service with consequential financial loss and four adverse entries in the service book". Thereafter another notice (Annexure-23) was served on the petitioner mentioning, besides the earlier allegations, a fresh charge and asking him to show cause as to why he should not be discharged from service. The petitioner replied. Some further queries were made from the petitioner and the matter, thus, remained in correspondence for a considerable period and no final order was passed. Subsequently a fresh notice starting a separate departmental proceeding was issued but this proceeding also remained in a dormant state. The petitioner was to superannuate from service by the end of

March, 1979 and in February, 1979, probably realising that fresh proceeding which had been initiated could not be concluded before his retirement, his suspension was withdrawn by the order in Annexure-27 and he was told" that a decision regarding the payment of his salary et cetera for the period of suspension would be taken later after final examination of the matter. The petitioner, thus, joined on 28-3-79 and retired three days later. He claimed, inter alia, his full salary for the period of his suspension in CWJC 63 of 1980, which was disposed of by a direction to the State authorities to consider and pass appropriate orders on the representation of the petitioner which had been filed in this regard in the department. Ultimately, the order as contained in Annexure-34 was made on 21-1-1981 stating that the petitioner was guilty of disobedience of the orders passed by the State, and the State was, therefore, taking a decision to reimpose on him the punishment mentioned in Annexure-22. It was also said that the petitioner would not be entitled to any additional payment beyond the subsistence allowance which he had already drawn, and for the period he was under suspension, he will be treated to have been in continuous service only for the purpose of pension

2. By the present writ petition the petitioner originally claimed his salary et cetera and by a subsequent petition he also challenged the order in Annexure-34, The case was heard by a Division Bench of which Mr. Justice H. L. Agrawal (as he then was) and Mr. Justice M. P. Varma were members. Mr. Justice Agrawal has held that in view of the rules included in the Bihar Service Code the Government had no jurisdiction to continue the departmental proceeding after the retirement of the petitioner and the portion of the impugned order in Annexure-34 imposing the punishment, therefore, was fit to be quashed. Mr. Justice Varma agreed with this view and I am not called upon to examine this part of the decision. On the question as to whether the petitioner was, in the circumstances, entitled to claim his full salary for the period of suspension, the learned Judges took divergent views. Interpreting Rule 97 of the Bihar Service Code Mr. Justice Agrawal held that as a general rule a Government servant cannot be held to be entitled to his full pay, in every case a disciplinary proceeding ultimately ends without imposing punishment on him. Referring to the circumstances, briefly, he further held that the petitioner was not entitled to any relief on this account. Mr. Justice Varma held that the discretion to refuse payment of full salary to the Government servant can be exercised only in a case which is covered by Sub-rule (3) of Rule 97 and since the present case cannot be held to be governed by the said Sub-rule, the petitioner's claim to the salary cannot be legitimately refused.

3. Mr. K. D. Chatterjee, appearing in support of the writ application, contended that the decision in B.D. Gupta Vs. State of Haryana, is fully applicable to the present case. Dr. Sada Nand Jha followed Mr. Chatterjee and emphasised the right to be heard on the basis of a Division Bench decision of this Court dated 18.10, 1979 in C.W.J.C. 1896 of 1976 (Dr. Kapildeo Narain Tiwary v. State). He further argued that no proceeding can be started against a Government servant

after his retirement in view of the observations in B.J. Shelat Vs. State of Gujarat and Others, . Proceeding further, it was urged that an enquiry under Rule 97 (3) is also in the nature of a disciplinary proceeding and, therefore, cannot be commenced or continued after retirement. When the salary of a servant is refused to be paid, it results in pecuniary loss and must, therefore, be held to be penal in nature. The learned counsel alternatively said that the matter should not be remanded for further consideration by the State authorities and this Court should, in view of the circumstances of the case, hold in favour of the petitioner that as a result of the quashing of the order of punishment imposed by Annexure-34, the petitioner has to be paid his full salary for the entire period.

4. Besides holding that the petitioner would not be entitled to any additional amount beyond what had already been paid by way of subsistence allowance, it was directed that the period of suspension shall not be treated as period spent on duty except for the purpose of pension. This aspect is covered by the provisions of Sub-rules (4) and (5) of Rule 97. The learned counsel for the parties, however, did not advance any argument on this aspect during the hearing. Later, when I was going through the judgments of the learned Judges mentioned above, I discovered that this aspect had not been specifically dealt with. The case was, therefore, placed on the cause list under my direction for further hearing. Dr. Jha, the learned counsel for the petitioner, contended that the present case is covered by Sub-rule (2) of Rule 97, and the period of absence should be, therefore, treated as period spent on duty for all purposes as directed by Sub-rule (4). He also supplemented his earlier arguments and urged that Sub-rule (3) cannot apply to a retired Government servant for the reason that the relationship of master and servant comes to an end on his superannuation and the person concerned cannot be held to be a "Government servant within the meaning of the Sub-rule. The counsel said that for the same reason Sub-rule (5) cannot apply to the present case. Mr. Government Advocate reiterated his earlier stand and argued that this case is clearly covered by Sub-rule (5).

5. The right of a Government servant to get his salary for the period he has been under suspension pending a disciplinary enquiry has to be determined in accordance with Sub-rules (2) and (3) of Rule 97, which are in the following terms :-

97. (2) Where the authority mentioned in Sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled, had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowance as such competent authority may prescribe :

Provided that the payment of allowances under Clause (2) or Clause (3) shall be subject to all other conditions under which such allowances are admissible.

The further question whether the period of his absence from duty should be treated as period spent on duty for all or any specified purpose has been dealt with in Sub-rules (4) and (5) quoted below :--

97. (4) In a case falling under Clause (2) the period of absence from duty shall be treated as a period spent on "duty for all purposes.

(5) In a case falling under Clause (3) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose :

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be Converted into leave of any kind due and admissible to the Government servant.

The provisions of Sub-rules (2) and (3) indicate that cases in which Government servants have been subjected to disciplinary enquiry are divided, for the question in issue, in two categories : first, where the competent authority is of opinion that the Government servant has been fully exonerated or in the case of suspension it was wholly unjustified; and the second category, in which all other cases are included. In the first case the Government servant is entitled to the full pay and allowance, while in the second, the competent authority has to take a decision as to the proportion of the pay and allowance to be paid to him. It need not be said that while exercising his discretion the competent authority is expected to follow the rule of just and fair play and should, therefore, take into account all factors which may be relevant. The principle laid down by Sub-rules (2) and (3) covers all cases of disciplinary proceeding. It cannot be assumed that the rules were framed to apply only to some of such cases, leaving the other cases uncovered, While deciding the question as to whether a given case comes under the first category or the second, it has to be appreciated that the second category is residuary in nature, and if a case is held to be not included in the first one, it must be deemed to belong to the second. The further question in regard to cases of the second category has to be answered with reference to Sub-rule (5).

6. Examining the present case in the light of the interpretation of the relevant provisions, as mentioned above, it appears that the petitioner was neither fully exonerated of the charges by the competent authority nor was the order of his suspension found wholly unjustified. I, therefore, hold in agreement with the views of H. L. Agrawal, J. (as he then was) that the case is covered by Sub-rule (3).

7. Before proceeding further it would be proper to mention the argument addressed by Mr. Government Advocate on this aspect as applicable to the case before us. He contended that the order of punishment as mentioned in Annexure 22 has remained in force all through, and at no point of time has been either withdrawn or set aside. Referring to the charges and the different annexures, the learned counsel stated, that fresh show cause notice, Annexure-23, was issued

with respect to a subsequent act of disobedience on the part of the petitioner, which was not the subject matter of the earlier proceeding and which ended with the order in Annexure 22. The learned counsel attempted to explain that part of Annexure-34 which stated about the re-validation of the punishment mentioned in Annexure-22, by saying that it was included in Annexure-34 out of confusion. In view of the observations made in the two judgments of the learned Judges in the present writ case, I do not think it is open to me to accept this part of the argument.

8. The cases relied upon by Dr. Jha do not support his argument that Sub-rule (3) is inapplicable to the present case. In *Kirti Bhushan Singh Vs. State of Bihar and Others*, , the Government servant was permitted to retire, and this order was later revoked and the petitioner was thereafter dismissed. The Supreme Court held that the order of retirement had become final in absence of any statutory provision entitling the State Government to revoke it, and consequently it was not open to the authority to proceed further against the petitioner. Similar was the position in *Bijay Shelat v. State of Gujarat* AIR 1973 S C 1109, where the appellant was allowed to retire with effect from 3rd December, 1973, and subsequently the departmental proceeding was started against him and he was suspended on 11th December, 1973. The Supreme Court pointed out that it was open to the competent authority to withhold permission to the appellant to retire, on the ground that a department proceeding was under contemplation, but this was not done and the appellant effectively retired before the impugned proceedings were commenced. The ratio of these cases is that in absence of a specific rule, disciplinary action is not maintainable after the retirement of a Government servant, and the judgments do not advert to or decide the question in issue in the present case and are of no help to the petitioner.

9. Similarly the cases of *Nepal Singh Vs. State of U.P. and Others*, and *Labourers Working on Salal Hydro Project Vs. State of Jammu and Kashmir and Others*, also do not advance the petitioners' point. In *Nepal Singh's* case (*supra*) a disciplinary proceeding, which was pending against a Government servant was dropped and the impugned order removing him from service was passed on the ground that his services were not required. The order was interpreted by the Supreme Court not to be one of termination simpliciter and was accordingly quashed, permitting the authority to start a fresh proceeding if considered appropriate. In the other case *Labourers Working on Salal Hydro Project Vs. State of Jammu and Kashmir and Others*, a Government servant filed a suit and the trial judge on consideration of the evidence and the circumstances in the case held the plaintiff entitled to his full, salary for the period under suspension. It is true that while confirming the trial court decree the Supreme Court pointed out that the appellant was never given any opportunity to place his case as no departmental enquiry was held against him and the criminal case prosecuting him had ended in his acquittal. The Court, however, further proceeded to examine the relevant facts and circumstances relied upon by the trial Judge for decreeing the suit and affirmed the trial court's decree. It is clear from the

judgment that the decision merely upheld the right of the Government servant to be heard. The further decree in the suit was based on the fact's and circumstances of the case.

10. The learned advocates for the petitioner heavily relied on the judgment in *B.D. Gupta Vs. State of Haryana*, and *Gopalkrishna Naidu v. State of Madhya Pradesh* AIR 1978 S C 240. Mr. K. D. Chatterjee pointed out that the relevant Rules of the Punjab Civil Services Rules in *B. D. Gupta's* case (supra) were identical to the Bihar Rules and while interpreting the same the Supreme Court in paragraph 14 of its judgment held that the appellant was entitled to a reasonable opportunity to show cause which had been wrongly denied him. The court then proceeded to examine the facts and circumstances of the case and in that background set aside the High Court's decision against the appellant and quashed the impugned order. This decision once more emphasised the rule of *audi alteram partem*, and enforced the principle of natural justice, but it nowhere said that in every case of reinstatement of a Government servant in services he shall be entitled to full salary.

11. In *Gopalkrishna Naidu's* case (supra) the relevant rule being fundamental Rule 54 was also in similar terms. To appreciate the full import of the decision it is necessary to state briefly the facts. The appellant *Gopalkrishna*, who was a Government servant, was prosecuted u/s 161 of the Penal Code, but the trial was set aside in appeal on the ground of want of proper sanction for prosecution. He was again prosecuted and the trial judge quashed the charge-sheet on a technical ground. In revision, High Court did not agree with the trial judge, but recommended that in view of the long delay, the prosecution should not be proceeded with. Following this recommendation the case was dropped, but a departmental enquiry was commenced. The Enquiry Officer found the appellant not guilty. The Government, however, did not agree and a notice was served on the petitioner to show cause as to why he should not be punished. Ultimately, the Government also held in favour of the appellant that the charges against him had not been proved. But it was said that "the suspension and the departmental enquiry were not wholly unjustified". In pursuance of this order the appellant was re-instated in the service and he retired from that very date (and this fact is crucial) on account of his reaching the age of superannuation. With respect to the period of suspension a decision was taken that the period of the appellant's absence from duty could not be treated as period spent on duty except for the purpose of pension and that he should not be allowed any pay beyond what was actually paid to him by way of subsistence allowance, A writ application filed by him was dismissed by the High Court and the case was then taken by the appellant to the Supreme Court. The Court held that the Government servant was entitled to get a reasonable opportunity to show cause, before a decision under Fundamental Rule 54 similar to the Bihar Rule, could be taken against him. This part of the judgment, again does not answer the disputed legal question, which is being debated in the case before me. The final direction given by the Supreme Court, however, appears to be important. The Court proceeded further

and directed the competent authority "to consider the question de novo after giving to the appellant a reasonable opportunity to show cause against the action proposed against him". The matter was, thus, remanded. It will be recalled that on reaching the age of superannuation the petitioner had already retired from service. The disciplinary proceeding also had ultimately concluded in his favour and he was reinstated in service for a day. In spite of this situation the Supreme Court directed the further enquiry to be held with reference to the remaining two unfavourable orders against the appellant. If the petitioner before me is right in contending that on the conclusion of a disciplinary proceeding if a Government servant is re-instated in service and thereafter he retires he must be paid his entire salary irrespective of the facts and circumstances in the case, the Supreme Court in *Gopalkrishna*'s case would not have remanded the matter for further consideration. The necessary inference which I draw from this decision is that the argument addressed on behalf of the petitioner, as mentioned, has no merit and must be rejected.

12. For the reasons mentioned above it must be held that the petitioner's claim for his entire salary during the period of his suspension has to be decided under Sub-rule (3). Since an adverse order against a Government servant affects him financially, it is necessary that before a decision is taken he is given a reasonable opportunity to place his case and all the relevant circumstances are considered by the appropriate authority. It has been contended on behalf of the petitioner that in the present case this Court should strike down the impugned decision, and order the payment of his full salary, with a further direction to treat the entire period as period spent on duty for all purposes. I am afraid, in view of the facts and circumstances of this case which I proceed to state briefly, that portion of the order in Annexure-34 which deprives him of these benefits, does not call for any interference. It has been stated by the petitioner in his application dated 4th November, 1980 (at pages 240 to 253) and his further application dated 24th January, 1981 (at pages 254 to 265) that after his retirement from service he filed a representation claiming these benefits and when this representation was not disposed of expeditiously he came to this Court with the writ application registered as C.W.J.C. 63 of 1980 and obtained a mandamus directing the respondents to consider and dispose of his claim within a period of two months. The matter, however, was not disposed of within the period indicated by the High Court and was belatedly concluded by the order in Annexure-34 which was challenged in the present case by an amendment petition, as stated earlier. The petitioner attached to his original present writ application a copy of his representation as Annexure-29 (at pages 205 to 229 of the records). While placing his case therein he had stated in detail the entire circumstances up to the date which were favourable to him, and placed his point of view with thoroughness, as he himself stated in paragraph 45 of the writ petition :

That finally the petitioner made a representation on 31st October, 1979 to the Respondent No. 2 wherein he gave the entire background of his case and pointed out. . .

(emphasis added)

Ultimately he summed up the situation in the following words : -

That as a consequence of the superannuation of the memorialist the proceeding, if any, has come to an end and with the revocation of the suspension order of the memorialist, he shall be deemed to be in continuous service until his superannuation without any break whatsoever.

That consequent thereto, the memorialist is entitled to his emoluments each month with all ancilliary benefits including the increments etc. . . .

He further complained :

That although the memorialist has superannuated with effect from the afternoon of 31st March, 1979, the State Government has not taken any steps to decide the amount of the pay drawn by the memorialist during the last one year of his service which forms the basis for determining his pension, gratuity etc. That is to say, the benefits accruing(s) after retirement.

That it is manifest that the State Government is under obligation of law to determine and accordingly pay to the memorialist his claims each (sic) month of his service tenure covering the entire period until retirement and the basis for the said determination will be the benefits derived by his next junior in the cadre.

The petitioner, thereafter, detailed the reliefs, he was claiming.

13. While explaining the delay in disposal of the petitioner's representation the respondents in their application dated 4th November, 1980 (at pages 240-253) set out in detail the process and the persons through whom the representation passed and the manner in which the claims of the petitioner were considered at different levels. In the course of this processing of the representation it is stated by the respondents, it was considered necessary to examine certain other relevant papers. Later, it is further said, that the Deputy Director recorded his opinion dealing with "all the grievances of the petitioner and submitted the same to the Special Secretary on 17th September, 1980". The matter was then examined by the Joint Secretary and the Special Secretary and it was decided to seek the opinion of the Department of Personnel. At that stage a complaint was made by the petitioner before this Court of undue delay. The respondent ultimately pleaded that a final decision would be taken by the Health Department after obtaining legal opinion and thereafter the matter would be placed before Health Minister for approval and all these would take some more time. Subsequently, it appears that the impugned order, Annexure-34, was passed on 21st January, 1985. I have given some details as stated in the application of the petitioner and in the show cause of the respondents, which lead to the irresistible conclusion that the petitioner placed his case in full and the respondents while taking a decision considered the same thoroughly.

14. The learned counsel for the petitioner as well as the learned Government

Advocate, representing the respondents, placed before me their respective points of view on the merits of the charges against the petitioner and the learned Government Advocate prepared a typed note setting out the relevant facts in chronological order, which are available from the records of the case (the note also made reference to the relevant pages of the records in this regard). I do not, however, propose to express my opinion on the conduct of the petitioner as I do not consider it necessary to do so. I have, however, referred to this part of the contention by the learned counsel; as their arguments, read with the relevant portions of the records do not leave any manner of doubt that the decision on the present disputed issue was not dependent on any fact on which evidence was required to be led. In this background, I am of the view that it was not necessary to hold a further formal enquiry against the petitioner. The petitioner put his point of view before the respondents which was examined thoroughly before taking the impugned decision, and a further enquiry would have been an empty formality. Before closing I would like to refer to two decisions of the Supreme Court dealing with the nature of the right to be heard and consequence of its violation.

15. In *The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee*, the Supreme Court observed that law is meant to serve the living and does not beat its abstract wings in the jural void. Its functional fulfilment as "social engineering" depends on its scrutinized response to situation, subject-matter and the complex of realities which require ordered control. Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and "the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. It was further said that Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity the Court will decline to be punctilious or fanatical as if the miles of natural justice were sacred scriptures. Earlier in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , it had been observed that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. 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 frame work of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. These observations were relied upon in paragraph 42 of the judgment in

Union of India (UOI) Vs. Sankalchand Himatlal Sheth and Another, . Judging the present case in the light of these observations it must be held that the requirements of the principle of natural justice have been fully satisfied and the petitioner is not entitled to a fresh opportunity. If in a given case a Government servant is not permitted to avail of a reasonable opportunity to place his defence before passing of an adverse order a further enquiry may be ordered even after his retirement as was done by the Supreme Court in Gopalkrishna's case (supra), but that is not the situation here.

16. So far the question, that the period of absence should be treated as period of duty for all purposes, is concerned, both Dr. Jha and the learned Government Advocate said that the same is not covered by the judgments of Agrawal, J. (as he then was) and Varma, J., but "since the writ case has been referred to me for its final disposal, this aspect also has to be dealt with by me. I think the common stand taken "by the learned counsel is correct. The language of Sub-rules "(4) and (5) is clear and there does not appear to be any doubt that on my finding that the case is governed by Sub-rule (3) and not Sub-rule (2), Sub-rule (4) is excluded and the question has to be answered by reference to Sub-rule (5). As directed by this sub-rule, in a case falling under Sub-rule (3) "the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose". The authority concerned has issued a necessary direction in this regard and there is no reason to interfere with it.

17. In the result, the punishments imposed by the order in Annexure-34 are set aside, but the prayer of the petitioner for quashing the remaining part of the said annexure is rejected. The writ application is, accordingly, allowed in part. The parties shall bear their own costs.