
(2012) 07 PAT CK 0105
In the Patna High Court
Case No : CWJC No. 16817 of 2009

Dr. Surendra Mohan Kumar Sinha and Another	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Bihar Pension Rules, 1950 — Rule 43(b)(a)(ii)

Citation : (2012) 4 PLJR 845

Hon'ble Judges : Ravi Ranjan, J

Bench : Single Bench

Advocate : Sanjay Kumar Gupta and Sunil Kumar, for the Appellant;

Final Decision : Allowed

Judgement

Ravi Ranjan, J.—Heard learned counsel for the petitioners and the State. Petitioners seek quashing of the order dated 23.8.2006 contained in Memo No. 633(17) passed by the Director-in-Chief, Health Services, Bihar, Patna (Respondent No. 8) holding that the period of absence of the petitioner from 7.10.1992 to 22.11.1993 be declared as extraordinary leave. Petitioners are aggrieved for the reason that in view of aforesaid they would not be paid any salary etc. for the aforesaid period in view of the provision as contained in Rule 180 of the Bihar Service Code.

2. Brief fact of the case is that petitioners after having sanctioned a leave of about 61 days had gone to the United States but they had overstayed there due to some extraordinary circumstances. It is admitted fact, as would be apparent from the impugned order, as contained in Annexure-3, that during the period the petitioners, who are husband and wife, had sent letters to the State officials under registered post for extension of their sanctioned leave. However, no decision was taken by the State officials on the aforesaid letters. Petitioners returned back and thereafter gave their joining in the Health Department itself on 23.11.1993 and thereafter they were posted on 12.1.1994 on their previous post in the Anugraha Narayan Medical College, Gaya. Both of them had retired

from the said post in the year 1999.

3. It appears that after their superannuation, the aforesaid period, for which they remained absent was treated as break in service which compelled the petitioners to approach this Court by filing C.W.J.C. No. 12196 of 1999. During the pendency of the writ application the order was modified. However, the matter was disposed of by this Court by order dated 7.7.2005, a copy of which has been appended as Annexure-1. This Court had held in the order concerned that before passing any order, which were prejudicial to petitioners, they were required to be provided an opportunity of hearing and as such, the Director-in-Chief, Health Department, Government of Bihar, was directed to pass a fresh order after receiving fresh representation from the petitioners. It appears that after the representation having been filed, no decision could be taken and as such, contempt petition was filed. During the pendency of the contempt petition the order as contained in Annexure-3 was passed leading to the disposal of the contempt petition granting liberty to the petitioners to challenge the same before an appropriate forum.

4. I have heard learned counsel for the petitioners and the State.

5. Learned counsel for the petitioners has submitted that the petitioners were still having 472 days of earned leave and half paid leave. Therefore, in place of adjustment as extraordinary leave, his absence should have been adjusted as earned leave as well as half paid leave in view of the fact that extraordinary leave would be prejudicial to the petitioners as they would not get anything during that period.

6. A counter affidavit has been filed on behalf of the State taking a stand in para-11 that the order contained in Memo No. 633(17) dated 28.3.2006 has already been upheld by this Court and thus the writ petition deserves to be dismissed. However, Learned counsel appearing for the State at the time of hearing of this petition has not been able to demonstrate before this Court as to by which order of this Court the impugned order has already been upheld. No reference of such case has been discussed in the counter affidavit. Stand has been taken in the counter affidavit that the order has been passed treating the leave as extraordinary leave in view of the fact that the petitioners have been found to have availed unauthorized absence during the concerned period. However, from the impugned order itself it is apparent that the period of absence was from 7.10.1992 till 22.11.1993 and the petitioners during that period have written letters from abroad requesting extension of their leave but no decision was admittedly taken by the State Government authorities. Thereafter, petitioners came back and were allowed to join and were posted at their previous place of posting. Thereafter, they had retired in the year 1999. However, neither any show cause notice was ever issued to the petitioners nor was any proceeding initiated against them as has been noted in the impugned order itself. It has been noted by the Respondent No. 8 himself, while passing the impugned order, that in this matter, prior to issuance of notices dated 26.2.1999, neither any enquiry report concerning any departmental proceeding was served upon the

petitioners nor were they given any second show cause notice. Even if it is assumed that the order as contained in Annexure-3 can be treated to be punishment imposed upon the petitioners under the proviso (a)(ii) of the Rule 43(b) of the Bihar Pension Rules, 1950 then the same would also not be permissible in view of the proviso to the Rule which only permits initiation of proceeding for a misconduct for a period prior to only four years from the date of such initiation. That apart it is not recorded in the order as to why the aforesaid leave under the head as claimed by the petitioners would not be admissible in view of absence of any order having been passed holding the petitioners to be guilty of a misconduct for absence for the period concerned unauthorizedly.

7. In above view of the matter, in my considered opinion, the order as contained in Annexure-3 in its present form is not sustainable in the eyes of law and, as such, the same is quashed. The writ application is allowed. The matter is remitted back to the concerned Respondent No. 8 for fresh consideration in view of the observations made by this Court specially regarding the adjustment of the petitioners period of absence under the earned leave as well as half paid leave. It is expected that the matter would be considered and a decision would be taken expeditiously by Respondent No. 8 preferably within a period of three months from the date of receipt/production of the certified copy of this order by the petitioners. In view of the fact that palpably incorrect statement has been made in the affidavit stating that this Court has upheld the impugned order dated 23.8.2006 and at the time of hearing the statement could not be justified by the learned counsel for the State, this Court would be inclined to impose a cost of Rs. 5,000/- upon the respondents.