
(2011) 09 PAT CK 0002
In the Patna High Court
Case No : CWJC No. 5771 of 2010

Girija Nand Jha	Vs	APPELLANT
The State of Bihar and Others		RESPONDENT

Date of Decision : 09-09-2011

Acts Referred:

Bihar Pension Rules, 1950 — Rule 43(b)

Citation : (2012) 4 PLJR 412

Hon'ble Judges : Navin Sinha, J

Bench : Single Bench

Advocate : Sushil Kumar Singh for the State, for the Respondent

Final Decision : Allowed

Judgement

Navin Sinha, J.—Heard learned counsel for the petitioner and the State. The petitioner superannuated on 31.7.2003 while in current charge of Superintending Engineer. Proceedings u/s 43(b) of Bihar Pension Rules (hereinafter referred to as the Pension Rules) were initiated against him on 3.6.2004. The single charge was that while holding the post of Executive Engineer (Mechanical), Irrigation Mechanical Division-2 at Birpur without adjusting the temporary advance he sanctioned further advance violating the rules. The evidence in support of the same was the report of the flying squad dated 31.7.2003. The inquiry report came to be submitted on 2.9.2005 holding that he had violated procedural rules. No second show cause with a copy of the inquiry report was given to him. The final order of punishment dated 23.6.2006 was passed withholding 10% of his pension. The appellate order dated 11.9.2009 confirms the punishment.

2. Learned counsel for the petitioner submitted that there are no allegations of gross misconduct causing pecuniary loss to the State Government, which was a sine qua non for invocation of power u/s 43(b) of the Pension Rules. The petitioner was not given a copy of the inquiry report alongwith a second show cause notice to enable him to persuade the disciplinary authority not to accept the inquiry report and to give him the benefit of exoneration. It is next submitted

from the specific assertion made a paragraph-17 of the writ application, that the audit team of the A.G., Bihar had not raised any objections and had not recorded any findings of pecuniary loss on account of alleged violation of procedures by the petitioner. This has not been denied in the counter affidavit.

3. Counsel for the State submitted that it was not an infallible rule that in every case a copy of the inquiry report must mandatorily be furnished with an opportunity to show cause and in absence of which the proceedings stands vitiated. No prejudice has been caused to the petitioner since he has himself annexed a copy of the inquiry report to the writ petition. If he had access to the inquiry report he could have filed objections before the authorities. The Court may not interfere with the order of punishment in exercise of powers of judicial review when the petitioner has not been able to demonstrate any prejudice by violation of procedures during the departmental inquiry as distinct from the proceedings before the disciplinary authority.

4. The single memo of charge served upon the petitioner states that he did not follow the departmental rules while sanctioning the advance. The charge does not state that by doing so he also caused pecuniary loss. The solitary evidence in support of the charge is the report of the flying squad dated 31.7.2003. The inquiry report discusses it as the background of the case. That also does not allege any pecuniary loss caused by the acts of the petitioner. The specific assertion of the petitioner in paragraph-17 of the writ petition that the audit had not raised any objections with regard to any pecuniary loss caused has been answered very casually in paragraph-16 of the counter affidavit stating that the respondents are not required to make any comment on the functioning of the Audit Department. From the two counter affidavits filed by the respondents it transpires that as a matter of fact the inquiry report was never served upon the petitioner with an opportunity to defend himself.

5. Whether non-service of the inquiry report has caused prejudice or not is a question to be determined on the facts of each case. When the allegations are not in dispute, and are not denied, such error in the departmental proceeding may not be fatal as it does not cause prejudice. But when the charges have been contested and a finding of guilt arrived at, matters are different. Disciplinary proceedings consist of two parts as explained in *Punjab National Bank and Others Vs. Sh. Kunj Behari Misra*, . The first part of the proceedings conclude when the Inquiry Officer submits his report. The second part of the proceedings starts when the disciplinary authority gives a show cause notice to the delinquent. The giving of an opportunity for defense at the first stage in accordance with law can be no substitute for a proper opportunity of defense at the second stage. The law mandates a fresh opportunity to be given to the delinquent for persuading the disciplinary authority not to accept the inquiry report and giving the benefit of exoneration. If procedures require the respondents to furnish a copy of the inquiry report, that the petitioner may have obtained it from other sources, shall not fulfill their obligations in law to do so.

6. The sine qua non for a proceeding under Rule 43(b) is the commission of a gross misconduct which causes pecuniary loss to the Government. The matter is considered serious enough to warrant that mere superannuation can be no reason to allow the offender to go away. If pecuniary loss is not caused to the Government it shall not be construed as gross misconduct, generally speaking under the Rules. There can be examples where without pecuniary loss the act was grossly unbecoming of a Government servant. Such cases may involve moral turpitude, an act bordering on wanton conduct with full knowledge of the bad consequences virtually tantamounting to a mens rea to commit the act. There has to be distinction between it and misconduct. The latter may be conduct which may not be of the approved standard and can be the outcome of various reasons but a deliberate wanton behaviour. Failure to abide by departmental procedures without furthermore cannot amount to gross misconduct ipso facto. In *The Regional Manager and Disciplinary Authority, State Bank of India, Hyderabad and Another Vs. S. Mohammed Gaffar*, the distinction was noticed holding:--

9. In contrast, the instances enumerated to define the expression "minor misconduct" would indicate that they are routine lapses or lapses or acts with no direct adverse financial implications or loss to the assets or pecuniary interests of the Bank. Claiming and availing of increments to which the respondent was held to be not entitled to and that too without the sanction or approval of the competent authority when he was the dealing person in the section, cannot be simply glossed over to be viewed not as a gross misconduct without doing violence to the meaning ascribed to the said expression.....

7. In Stroud's Judicial Dictionary misconduct has been defined as:--

Misconduct means, misconduct arising from ill-motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct.

The matter again came to be considered in *Union of India (UOI) and Others Vs. J. Ahmed*, holding:--

11...A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct.... It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic

example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationary train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah vs. Manager, Ahmedabad Coop. Department Stores Ltd.). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

8. On perusal of the inquiry report, the Court finds that the respondents evolved a novel method for conduct of the proceedings contrary to law. In a departmental proceeding after charges are framed, they have to be proved by the Presenting Officer. Any report of the flying squad was only the substance in support of the charge. The actual pecuniary loss caused by reason of the conduct of the petitioner while acting contrary to the rules was required to be proved by the respondents through the Presenting Officer only whereafter the petitioner was required to present his defense. It was not a case where the documents themselves were sufficient evidence of the charge not required to be proved by other evidence as in a case where a document in the possession of the delinquent may bear interpolation shifting the onus on the delinquent. The audit report had not opined any financial loss. The inquiry report proceeds to decide the charges in light of the defense furnished by the petitioner. The finding in the inquiry report ultimately again is for violation of rules and not of any pecuniary loss. Moreover, the inquiry report is the mere ipse dixit of the inquiry officer when he does not consider it necessary to even discuss what procedural rules have been violated and in what manner.

9. This Court in C.W.J.C. No. 11 of 2010 has already held by a detailed discussion that the extra ordinary power under 43(b) requires great caution in its exercise. While one guilty person should not go scot free, the Court is of the firm opinion that not one innocent should be hounded. It cannot be lost sight of that a person who has superannuated has only his meager pensionary resources to survive. He has to contest the proceedings before the authorities as also the Court by engaging a lawyer from his limited pensionary resources when he has no other source of income in the evening of his life. While this can be no consideration in a case of gross misconduct causing pecuniary loss to the Government, where that requirement is not fulfilled and yet a proceeding is initiated, It is an extremely serious matter.

10. This Court has already cautioned the need for a in-house exercise first by a preliminary assessment of the likelihood of success or failure in such a proceeding by a cost benefit analysis before resorting to it. Apart from the question of hounding a retired employee, the question also is of wastage of time

and money of the State by irresponsible exercise of power.

11. The Supreme Court in *Ram Dayal Rai Vs. Jharkhand State Electricity Board and Others*, has held that even a 5% reduction of pension is a serious matter for a superannuated person who has no other source of income.

12. If the issue involved was serious withholding 10% of the pension, surely the appellate authority was required to exercise its statutory powers by proper application of mind discussing the charge, the inquiry report and the grounds in the memo of appeal to conclude why the Appeal could not be accepted. While an appellate authority is not required to pass a detailed order on merits like the original authority, nonetheless, it is required to at least briefly indicate proper application of mind. Rule 27 of the Bihar CCA Rules itself mandates the manner in which the appeal has to be considered. The appellate order simply states that the matter has been reconsidered and there was no reason to interfere with the punishment. What was reconsidered, is left unanswered in the appellate order which is thus also in teeth of the statutory provisions or Rule 27 regulating the powers of the appellate authority.

13. The duty of the appellate authority for passing reasoned orders has also been emphasized in *Divl. Forest Officer, Kothagudem and Others Vs. Madhusudhan Rao*, :--

20. It is no doubt also true that an appellate or revisional authority is not required to give detailed reasons for agreeing and confirming an order passed by the lower forum but, in our view, in the interests of justice, the delinquent officer is entitled to know at least the mind of the appellate or revisional authority in dismissing his appeal and/or revision. It is true that no detailed reasons are required to be given, but some brief reasons should be indicated even in an order affirming the views of the lower forum.

14. The order of punishment dated 23.6.2006 and 11.9.2009 are, accordingly, set aside. The petitioner is held entitled to all consequential relief alongwith interest @ 10% from the date that the deduction has been made till the date of payment. Nothing precludes the State from holding an in-house exercise with regard to the circumstances under which this relief came to be granted with interest and recover the interest amount from the concerned so that no financial loss is caused to the State Government by the acts of those in whom the State reposed trust expecting them to act in its best interest by proper exercise of the power entrusted.

15. Let this order be complied with within a maximum period of two months from the date of receipt/production of a copy of this order. The application is allowed.