
(2012) 10 JH CK 0033
In the Jharkhand High Court
Case No : Writ Petition (S) No. 708 of 2009

Hiralal Das

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 04-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 468(2)(c)

Citation : (2012) 10 JH CK 0033

Hon'ble Judges : Aparesh Kumar Singh, J

Bench : Single Bench

Advocate : Bhanu Kumar, for the Appellant; S.P. Roy, GA For the State of Bihar, for the Respondent

Final Decision : Allowed

Judgement

Aparesh Kumar Singh

I.A. No. 2559/2011

1. By the instant interlocutory application, the petitioner has sought for quashing of the order of dismissal dated 14.3.1996 contained at Annexure-2 to the writ petition and also for quashing of the order dated 15.09.1999 contained at Annexure-4 to the writ petition by which the appeal of the petitioner against the order of his dismissal has also been dismissed on the grounds that both the orders have been passed by the same authority i.e. the State Government at the highest level and communicated through the Deputy Secretary, Water Resources Department, Government of erstwhile Bihar. The petitioner seeks to impugn the aforesaid impugned orders by way of amendment in the present writ application.

It is the contention of the petitioner that the these facts have come to the notice after information furnished under the Right to Information Act, on the application of the petitioner, through letter dated 04th September 2009 which has been brought on record by way of supplementary affidavit.

Counsel for the respondent State, on the other hand, objected to the same stating that the writ petition was originally filed for seeking the relief in respect of payment of pensionary benefits and the petitioner being conscious of the order of dismissal as well as the appellate order passed in 1996 and 1999 respectively, have chosen not to assail the same in the main writ application. He submitted that by incorporating such amendments, matters which have been settled long back, shall be reopened. However, no affidavit in response to the present I.A. has been filed on behalf of the respondent although the instant I.A. was filed in August 2011.

However, after hearing the parties, it appears that the order of dismissal and the order passed in appeal have been passed by the same authority at the highest level i.e. the Hon"ble Minister of the Department concerned which fact has come to the notice after furnishing of the information under the Right to Information Act to the petitioner after filing of the writ application and has been brought on record by way of supplementary affidavit. Though the petitioner had originally sought for a direction to pay the pensionary benefits in the main writ application, but the benefits of grant of pension and gratuity are also dependent upon the determination of issues raised in the instant interlocutory application where such orders are under challenge. Moreover, such orders of dismissal and the appellate authority are already on record in the main writ application and the same are assailed on pure questions of law by the petitioner. Therefore, in the interest of justice, this I.A. is allowed and the petitioner is permitted to incorporate the prayer made in the instant interlocutory application in the main writ application. This I.A. shall be treated as a part of the main writ application. I.A. is disposed of.

WPC No. 708/2009

Heard learned counsel for the parties.

This writ petition has been preferred initially for payment of pensionary benefits to the petitioner. However, by way of subsequent amendment, the orders dated 14.03.1996 and 15.09.1999 issued by the Deputy Secretary, Water Resources Department, Government of erstwhile Bihar contained at Annexures-2 & 4 to the writ application, have been challenged.

2. The case of the petitioner is that he was initially appointed in the year 1976 on the post of storekeeper in the Irrigation Division, Sikatia, Deoghar under Water Resources Department, Government of Bihar. A criminal case vide Sarath (Chitra) P.S. Case No. 08 of 1985 was lodged on 30th January 1985 against one Ravi Pada Manjhi, Junior Engineer, Shyam Sundar Bhalotia, Carriage Contractor and the petitioner on the written complaint of the Executive Engineer, Irrigation Division, Sikatia on the allegation of shortage of 53.549 MT of Iron Rods while in transportation from Irrigation Division, Jamui to Sikatia Division in the year 1977-78 and 1978-79 by which it was alleged that a loss of Rs. 2,89,159.28 have been caused to the State Exchequer.

3. The petitioner was placed under suspension on 10th August 1985 with

headquarters at Deoghar. It is the contention of the petitioner that such loss was recovered from the Bill of the contractor Shyam Sunder Bhalotia and as a result, no loss was finally caused to the Government. During the suspension period of the petitioner, one of the accused of Sarath (Chitra) P.S. Case No. 08 of 1985 Ravi Pada Manjhi preferred revision against the order dated 2nd June 1987 passed by the Judicial Magistrate, Deoghar whereby cognizance was taken against him and other accused persons including the petitioner. The said revision was allowed by order dated 3rd June 1991 quashing the order of cognizance as being barred by limitation under the provisions of section 468(2)(c) of the Code of Criminal Procedure. According to the petitioner, after quashing of the order of cognizance by the revisional court, the pending criminal proceeding was not proceeded further against the petitioner as well. Thereafter, a departmental proceeding was initiated against the petitioner leading to passing of order of dismissal dated 14.03.1996 (Annexure-2). The petitioner thereafter approached the Hon'ble Patna High Court in CWJC No. 4907 of 1996 which was withdrawn with liberty to the petitioner to prefer a departmental appeal in terms of Rule-4 of the Bihar and Orissa Sub-Ordinate Services (Discipline and Appeal) Rules, 1935. The petitioner preferred appeal against the order-of dismissal and the said appeal was also rejected and communicated to the petitioner vide letter dated 15.09.1999 issued by the Deputy Secretary, Water Resources Department, Government of erstwhile Bihar (Annexure-4).

4. According to the petitioner, the order of dismissal and the appellate order are both cryptic orders without containing any reasons. It is submitted on behalf of the petitioner that on the basis of his dismissal from service, the petitioner was denied the pensionary benefits and gratuity which cannot be paid to the dismissed employee. Counsel for the petitioner has relied upon the provisions of Bihar and Orissa Sub-Ordinate Services (Discipline and Appeal) Rules, 1935 specially Rule-4 thereof which provides that every member of a Subordinate Service (including temporary Government servants and officers on probation) shall be entitled to appeal to the authority immediately superior to the authority which passed an order (a) imposing upon him any of the penalties specified in Rule 2 (b) terminating his appointment otherwise than on the expiry of the period of his appointment or on his reaching the age of superannuation. Under Rule-2-(viii) one of the punishment stipulated is dismissal from the Civil Services of the Crown which ordinarily disqualifies from future employment. It is submitted that the dismissal order and the appellate order has been passed by the same authority as would appear from the notings on the file in respect of the disciplinary proceeding against the petitioner brought on record upon information furnished under the RTI Act by way of supplementary affidavit.

5. According to the petitioner, as it would appear from the notings on pages-80 to 82 of the said supplementary affidavit, the decision to impose the maximum punishment of dismissal from service has been taken by the Hon'ble Minister of the department by rejecting the recommendation of the departmental secretary who had given a proposal that the concerned employee would be awarded minor

punishment and the amount involved in defalcation, could be recovered from the employee in due proportion. Counsel for the petitioner further submits by referring to the notings as contained at pages-121 and 122 that even the decision to reject the appeal has been taken at the highest level i.e. Hon''ble Minister of the department. It has been further submitted that as would appear from the both notings referred to herein-above, the same person was in capacity as Hon''ble Minister of the department concerned.

6. Counsel for the petitioner has relied upon the decision of the Hon''ble Supreme Court of India in the case Surjit Ghosh Vs. Chairman and Managing Director, United Commercial Bank, and others, . He has also relied upon the decision of the Single Bench of this court passed in W.P.(S) No. 5987 of 2008 in the case of Prema Marandi vs. The State of Jharkhand & others wherein also this court vide order dated 19.08.2011 had declared the order of dismissal as illegal on account of the fact that the dismissal order was passed by the appellate authority denying the delinquent a right to appeal which is valuable and substantive right in support of his contention that if the order of dismissal is passed by the appellate authority himself, then the substantive right of appeal of the aggrieved employee is deprived and such a situation cannot be said to be legally tenable. It is the contention of the petitioner that the petitioner is only a class-III employee whose appointment is made at the divisional level and the order of dismissal and the appellate order has been passed at the highest level of the State Government pursuant to the decision taken by the Hon''ble Minister of the department which negates the very essence of the principles of natural justice.

7. Counsel for the respondents, on the other hand, submits that the petitioner was implicated in a criminal case for causing loss of goods of the department leading to loss of revenue to the State Exchequer. In the year 1985, he was placed under suspension and remained as such till the date of his dismissal from service in the year 1996. The petitioner thereafter approached the Patna High Court and thereafter withdrew the writ application in order to pursue the remedy of appeal on his own. The appellate authority after considering the entire facts and circumstances, has been pleased to reject the petitioner''s appeal as the facts of the case warrant maximum punishment as it involves misappropriation of the Government money. Counsel for the respondents also submits that the order of cognizance was quashed only on the ground of limitation and not on merits by the revisional court, upon which the petitioner is harping. However, counsel for the respondents is not able to refute the facts brought on record by way of supplementary affidavit containing the notings supplied under the Right to Information Act to the petitioner in September 2009, as per which the order of dismissal and the appellate order has been passed by the same authority and that too at the highest level of the State Government itself.

8. I have heard learned counsel for the parties at length and gone through the relevant records including the notings which have been brought on record by the petitioner through supplementary affidavit. From perusal of the impugned orders

dated 14.03.1996 (Annexure-2) and 15.09.1999 (Annexure-4), it is apparent that they are issued under the signature of the Deputy Secretary, Water Resources Department, erstwhile Government of Bihar informing the petitioner of the decision of the Government. The appellate order and the original order are cryptic orders; the dismissal order is in itself a cryptic order which does not contain reasons except stating that the allegation against the petitioner, inquiry report, his second show-cause notice have been duly reviewed and he has been found to be guilty and as such, was dismissed from service. The appellate order is also a cryptic order again conveying the decision of the Government that on due consideration of the appeal of the petitioner, it has been found that he has failed to discharge his official responsibility leading to financial loss and as such, no interference in the order of dismissal is required to be made. From the notings brought on record, it is apparent that the decision to dismiss the petitioner from service was taken at the highest level of the Government i.e. Hon''ble Minister of Water Resources Department of the Government of erstwhile Bihar on 15.02.1996. Thereafter, the order of dismissal was conveyed to the petitioner vide communication dated 14.03.1996 (annexure-2). The decision to reject the appeal of the petitioner was also taken at the highest level of the Government i.e. Hon''ble Minister of the Water Resources Department on 25th July 1999, whereafter, it was communicated vide letter dated 15.09.1999 (Annexure-4). Rules for conduct of departmental proceeding relied upon by the petitioner provides for substantive right of appeal under Rule 4 of Bihar and Orissa Sub-Ordinate Services (Discipline and Appeal) Rules, 1935. The order of dismissal initially have been passed at the highest level of the State Government and thereafter, the same authority has sat over in an appeal over his own judgment while considering the appeal of the petitioner and rejected it. It is well settled under the principles of natural justice that no man should be a judge in his own cause i.e. *nemo in propria causa judex, esse debet*.

9. The writ petition earlier preferred by the petitioner was withdrawn by the petitioner on the ground that the statutory remedy of appeal is available to the petitioner under Rule-4 of Bihar and Orissa Sub-Ordinate Services (Discipline and Appeal) Rules, 1935. However, the statutory remedy of appeal is rendered nugatory and illusory as the same have been exercised by the same authority at the highest level of the State Government. The judgment relied upon by the petitioner in the case *Sujit Ghosh (Supra)* on the same point is illuminatory. Paragraph-5 of the said judgment is quoted herein-below:

5. The respondent-Bank in its submission contended that although it is true that the Deputy General Manager had acted as the disciplinary authority when he was in fact named under the Regulations as an appellate authority, no prejudice is caused to the appellant because the Deputy General Manager is higher in rank than the disciplinary authority, viz., the divisional Manager / AGM (Personnel). According to the Bank, it should be held that when the order of punishment is passed by a higher authority, no appeal is available under the Regulations as it is not necessary to provide for the same. It was also contended that there is no

right to appeal unless it is provided under the Rules or Regulations. Although, the argument looks attractive at first sight, its weakness lies in the fact that it tries to place the Rules / Regulations which provides no appeal on par with the Rules / Regulations where appeal is provided. It is true that when an authority higher than the disciplinary authority itself imposes the punishment, the order of punishment suffers from no illegality when no appeal is provided to such authority. However, when an appeal is provided to the higher authority concerned against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules / Regulations. An employee cannot be deprived of his substantive right. What is further, when there is a provision of appeal against the order of the disciplinary authority and when the appellate or the higher authority against whose order there is no appeal, exercises the powers of the disciplinary authority in a given case, it results in discrimination against the employee concerned. This is particularly so when there are no guidelines in the Rules / Regulations as to when the higher authority or the appellate authority should exercise the powers of the disciplinary authority. The higher or appellate authority may choose to exercise the power of the disciplinary authority may choose to exercise the power of the disciplinary authority in some cases while not going so in other cases. In such cases, the right of the employee depends upon the choice of the higher / appellate authority which patently results in discrimination between an employee and employee. Surely, such a situation cannot savour of legality. Hence we are of the view that the contention advanced on behalf of the respondent-Bank that when an appellate authority chooses to exercise the power of disciplinary authority, it should be held that there is no right of appeal provided under the Regulations cannot be accepted.

10. The writ petition although appears to have been filed in the year 2009 initially with a prayer for grant of pensionary benefits, but after filing of the writ petition, documents under the Right to Information Act were furnished which have been brought on record by way of supplementary affidavit from which the petitioner discovered the aforesaid serious illegality in the decision making process by the original authority as well as the appellate authority. In these circumstances, even though, originally the petitioner may not have sought for quashing of the order, but in view of the subsequent development during the pendency of this writ petition, orders which squarely and seriously affect the petitioner in so far as the payment of pensionary dues are concerned, have been sought to be impugned in the present writ application and accordingly, allowed to be incorporated in the main writ application by the order passed in I.A. No. 2559 of 2011. In the aforesaid facts and circumstances and the discussions made herein-above, the impugned orders, as contained in Annexures-2 & 4, cannot be sustained in law and are quashed. The matter is remanded back to the competent authority / Disciplinary Authority to reconsider the case of the petitioner in respect of the disciplinary proceedings which were initiated against

him and pass a reasoned and speaking order in accordance with law, within a period of sixteen weeks from the date of receipt / production of a copy of this order. It is informed that after bifurcation of the State, the State of Jharkhand would be the competent authority of the petitioner. Accordingly, the competent authority under the Water Resources Department, Government of Jharkhand, under whom the petitioner was working, may proceed to take the decision in accordance with law.

It is informed by the counsel for the petitioner that the date of superannuation of the petitioner, according to his date of birth i.e. 12.01.1949, is 31.01.2009 and as such, by now the petitioner has reached his age of superannuation.

In the circumstances, the competent authority will proceed to take the decision under the relevant provisions of Jharkhand Pension Rules in respect of the disciplinary proceedings which were initiated and concluded against him.

The petitioner would be entitled to the consequential relief depending upon the outcome of the decision taken by the disciplinary authority, so far as the pensionary dues are concerned. However, it is made clear that the petitioner has remained in suspension from 1985 till the date of dismissal and during this period, he was paid subsistence allowance, although he has not discharged his duty. Accordingly, the petitioner will not be entitled for the remaining salary for the period under suspension or the back wages.

The writ petition is allowed in the aforesaid terms.