
(2015) 08 PAT CK 0077

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9326 of 2008

Jata Shankar Singh

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-08-2015

Acts Referred:

Citation : (2015) 08 PAT CK 0077

Hon'ble Judges : Mihir Kumar Jha, J

Bench : Single Bench

Advocate : Sanjeet Kumar, for the Appellant; S.A. Alam, SC and Mrityujay Kumar Jha, AC to SC, Advocates for the Respondent

Judgement

Mihir Kumar Jha, J—Heard learned counsel for the parties.

2. The petitioner in this writ application has assailed the order of punishment dated 14.1.2004 passed by the Collector of Jamui district as also the appellate order passed by the Divisional Commissioner dated 28.8.2006 and to that extent, it would be relevant to quote paragraph No. 1, 2 & 3 of the writ application, which reads as follows:-

"1. That by this writ petition the petitioner prays for quashing of the order of the Divisional Commissioner dated 28.08.2006 communicated to the petitioner by Memo no: 2163 by which 75% of the pension has been withheld illegally though he gave a finding that the recovery can be made only after the petitioner is found guilty of alleged defalcation.

2. That petitioner also prays for quashing of the order of Collector contained in Memo No: 34 dated 14.01.2004 by which on the basis of illegal enquiry report directed the recover a sum of Rs. 3,52,018.98 from the petitioner with interest from the post of retirement benefits and has also denied the salary for alleged unauthorized absence.

3. That the petitioner also prays for direction upon the respondent to pay all the

post retirement benefit as also the subsistence allowance which is due to the petitioner and any other relief/reliefs for which they are entitled as your Lordships may deem fit and proper."

3. Learned counsel for the petitioner, in support of the aforementioned prayer, has raised many issues but, the following two, which will go to the root of the matter, are as follows:-

(i) The disciplinary authority, namely, the Collector of the district has not considered the show-cause reply filed by the petitioner pursuant to the service of enquiry report on the petitioner and, as such, the impugned order is non-speaking order.

(ii) Secondly, the appellate authority in fact has gone to enhance the punishment in the sense that he has also kept the recovery of the amount pending till judgment of the criminal case by making such recovery operative only in the event the petitioner being found convicted by the criminal court but, then, he has added a punishment by way of withholding of 75% of pension by going beyond order of punishment passed by the Collector of the district.

4. According to learned counsel for the petitioner, the appellate authority firstly was not empowered to do so and secondly even if he had contemplated to do so, at least a show-cause notice was required for enhancing such punishment.

5. Mr. S.A. Alam, learned counsel for the State, while replying to the aforementioned submissions, has come out with a plea that the petitioner having deliberately defalcated the huge amount of government money, cannot be shown any leniency and the government can only take a compassionate view if the petitioner refunds the entire amount of loss/misappropriation made by the petitioner i.e. Rs. 3,52,018.98/- with interest as directed by the Collector in the order.

6. In the considered opinion of this court, while the first submission of the learned counsel for the petitioner must fail, inasmuch as, by now it is well settled that in case of agreement with the findings of the enquiry report, the disciplinary authority is not required to record reasoned order. Reference in this connection may be made to the judgment of the Apex Court in the case of State of Assam and Another Vs. Bimal Kumar Pandit, AIR 1963 SC 1612 : (1963) 1 LLJ 295 : (1964) 2 SCR 1 .

7. However, the second aspect raised by the petitioner will be worth consideration and, for this purpose, this Court would firstly quote the contents of the impugned order passed by the Collector of the district, which reads as follows:-

8. As would be evidenced from the reading of the aforesaid impugned order of punishment and more particularly from its underlined portion, the impugned order of punishment came to be passed after the retirement of the petitioner. There was a continued departmental proceeding in the sense that memo of

charge was framed while the petitioner was in service. The enquiry proceeding was continuing while the petitioner remained in government service. The second show-cause notice with the enquiry report was also served by him while the petitioner was continuing in service. Only the impugned order was passed after the retirement of the petitioner. Such a recourse could have been taken by the disciplinary authority in terms of Rule 43B of the Bihar Pension Rule as has been laid down by the Full Bench judgment of this court in the case of Shambhu Saran Vs. The State of Bihar and Others, (2000) 1 PLJR 665 .

9. What however really will make this writ application still succeed in part is the appellate order. As noted above, the disciplinary authority had passed an order for recovery of the amount of alleged misappropriation to the tune of Rs. 3,52,018.98/-. That was well within the ambit of Rule 43B of the Bihar Pension Rule, inasmuch as any loss sustained to the government can be recovered on a conclusion of the departmental proceeding in terms of Rule 43B of Bihar Pension Rules. The second punishment that the petitioner will not be entitled for any salary either for the period of suspension i.e. 9.9.1998 onwards or for the period he had not found to have been working again will require no interference by this court on the settled principle of no work, no pay.

10. The appellate authority, however, has gone beyond the ambit of the order of the disciplinary authority in the sense that he has kept the order of recovery pending and subject to the petitioner being convicted in the criminal case. In other words, that order of punishment of recovery has been not interfered with and only stayed by keeping it subject to result of the criminal case. Thus, the punishment of also withholding 75% of the pension of the petitioner by the appellate authority will be an additional punishment by way of enhancement inasmuch such relevant portion of appellate order reads as follows:-

"----The Collector Jamui on the basis of the report passed the following order:

A) Since Jatashankar Singh has retired from service, the Departmental Proceeding was converted and to be decided as per provisions of Rule 43(b) of the Bihar Pension Rule, 1950.

B) It was also ordered to recover the defalcated amount of Rs. 3,52,018.98 along with penal interest from the pensionary benefits of Jatashankar Singh.

C) It was directed not to pay Jatashankar Singh the salary for the period of absence from duty.

After hearing both the parties and perusing the record it appears that the Appellant was served with the charges and submitted his explanation and also appeared before the Enquiry Officer. The Enquiry Officer ought to have dealt in detail the basis on which the charges were found to be proved. However agreeing with the detailed report submitted by the Anchal Adhikari Jamui he found the charges to be proved. I also come to the conclusion that the charges stand proved against the Appellant. However, I do not agree with the part B of

the order by which the entire amount has been asked to be recovered from the Appellant. I agree with the argument placed by the Appellant that the defalcated amount should not be recovered unless responsibility is fixed on all the persons responsible for the defalcation. I am also of the view that since a criminal case is pending before the Court and therefore the defalcated amount should be recovered only after the Appellant is found guilty of defalcation. On the basis of the facts and analysis as mentioned above I hereby set aside the part B of the order, by which order of recovery has been passed. After finding the charges to be proved against the Appellant I hereby order to withheld 75% of the pension that means the Appellant shall be paid only 25% of the amount of pension. With this the appeal is partially admitted and the Order of the Collector is modified to that extent."

11. The appellate authority however could not have done to in terms of the earlier rule being Bihar and Orissa Subordinate Services (Discipline and Appeal) Rule 1935 vested in the appellate authority. Let it be noted that since the memo of charge was framed and order of punishment was passed much earlier to the new Bihar Government Servant (Classification, Control and Appeal) Rules 2005 come into force but, the case, in hand, will be governed by the provision of Bihar and Orissa Subordinate Services (Discipline and Appeal) Rules, 1935 wherein no power of enhancement of the punishment has been vested with the appellate authority under the rule. Rule 6 of Rules, 1935 reads as follows:-

"6. In the case of an appeal against an order imposing any penalty specified in rule 2 the appellate authority shall consider -

- (a) whether the facts on which the order was passed have been established;
- (b) whether the facts established afford sufficient ground for taking action; and
- (c) where the penalty is excessive, adequate or inadequate; and after such consideration shall pass such orders as it thinks proper."

12. As would be evident from reading of the Rules, no power of enhancement has been vested in the appellate authority and, therefore, that part of the order of the appellate authority cannot be sustained by this Court inasmuch as apart from recovery and non-payment of salary for the period of absence from duty of the petitioner the appellate authority has gone to also pass an order of withholding 75% of the pension of the petitioner by allowing him to receive only rest 25%. As noted above, this cannot be done by him in terms of Rule 6 of the 1935 Rules.

13. This Court also cannot concur with the appellate order where he has upheld the order of the Collector that a fresh proceeding under Rule 43B could be initiated against the petitioner. First of all, after the petitioner had retired and when the order of punishment had been passed, that itself was by way of a proceeding under Rule 43B. Normally, the Commissioner, having passed the order of punishment of withholding 75% of pension which could have been end

result of the proceeding under Rule 43B, no purpose in fact was sought to be achieved by either withholding or allowing the proceeding under 43B to be again undertaken against the petitioner.

14. There is also no order either of the disciplinary authority or the appellate authority as with regard to treating the period of suspension because whatever has been said for withholding the payment of salary of the petitioner for the period of his absence of duty, may also include the period of his suspension under which he continued from 9.8.1998 till his retirement i.e. 31.12.2003. the disciplinary authority as also the appellate authority was required to take into account the provision of Rule 97(3) of the Bihar Service Code and if it was found by either of them that the petitioner was not entitled for payment of salary beyond subsistence allowance for the period of suspension, a specific order, after affording an opportunity of hearing to the petitioner, ought to have been passed.

15. Having thus regard to the aforesaid situation, while this Court does not find any error in the order of punishment of disciplinary authority, this Court would quash the appellate order of the Commissioner dated 28.8.2006/25.8.2006 as contained in Annexure-1 to the writ application (Annexure-2 to the counter affidavit) and remit the matter back to the Divisional Commissioner, Munger for fresh consideration and passing an order within a period of four months from the date of receipt of this order.

16. Before parting with, this Court must make it clear that as the memo of charge was not referable to the criminal case nor the order of punishment passed by the Collector in any way had taken cognizance of the criminal case and therefore, whatever decision has to be taken by the Commissioner will be based on the materials on record including evidence and enquiry report in the disciplinary proceeding and he shall not be in any manner guided by the pendency or the outcome of the criminal case which has to be decided on its own merit and on a different parameter, namely, proving of charge beyond reasonable doubt as against the principle of preponderance of probability to be followed in the case of the departmental proceeding.

17. It however goes without saying that as soon as the trial of the petitioner is decided, the respondent Collector of Jamui district shall take his decision for ultimate payment of retirement benefit and till then it is the outcome of the appellate order which shall govern the fate of payment of retirement benefit.

18. This application is, accordingly, allowed in part to the extent indicated above.

19. There would be, however, no order as to costs.