
(2007) 12 PAT CK 0044

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 12114 of 1998

Kishori Lal

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Citation : (2007) 12 PAT CK 0044

Final Decision : Allowed

Judgement

Navin Sinha, J.—The petitioner superannuated on 31.10.1990, from the Department of Water Resources, Government of Bihar, substantively holding the post of Assistant Engineer while he held additional charge as Executive Engineer. He is aggrieved by the denial of certain service and retirement benefits.

The petitioner, in his service tenure was subjected to more than one departmental proceeding on certain charges and punishments were imposed on him.

2. The petitioner came to this after his superannuation originally in 1993 in CWJC No. 11352 of 1993 aggrieved by the non-payment of his retirement benefits. During the pendency of the writ petition by an order dated 4.3.1994 his C.P.F., Group Insurance and 90% of provisional pension were ordered to be released. While the writ petition was still pending, on 9.3.1994 fresh orders were issued reducing his pension to 70% in exercise of powers under Rule 139 of the Bihar Pension Rules. The petitioner had preferred two separate departmental appeals against the orders of punishment and which were pending. This Court on 25.3.1996 disposed the writ petition only with directions to decide the pending appeals expeditiously. By a common order dated 26.8.1996 both the departmental appeals were rejected and the orders of punishment upheld. The petitioner then came to this Court in CWJC No. 9070 of 1997 questioning the common appellate orders rejecting his two appeals.

3. Simultaneously, the petitioner preferred CWJC No. 4450 of 1997 for release of

his retirement and other benefits. On 22.4.1998 CWJC No. 4450 of 1997 was disposed granting liberty to the petitioner to file a detailed representation before the Accountant General and the Commissioner-cum-Secretary, Department of Water Resources, Government of Bihar, who were then required to pass a combined reasoned order disposing the representation with regard to retirement and other service dues. The dues payable were directed to be released immediately thereafter. The petitioner filed his representation on 6.5.1998, which was disposed by a common order dated 30.7.1998. While certain relief's were granted, the denial of others have compelled him to approach this Court.

4. Learned Counsel for the petitioner assailed the order of reduction of pension to 70% as bad for non-compliance of the statutory provisions of Rule 139(C) of the Pension Rules to submit that no opportunity to show cause had been furnished prior to the issuance of the order. Reliance for the same has been placed on a Bench decision of this Court reported in Sharda Prasad Sinha Vs. The B.S.E.B. and Others, in support of the same. Learned Counsel next assailed the order dated 3.5.1994, that nothing shall be payable for the period of suspension except subsistence allowance but that the same shall be counted for the purposes of pensionary service, as bad for non compliance of a notice under Rule 97(3) of the Bihar Service Code. It was next submitted that the financial benefit of the increment actually denied to him as a punishment did not take away his eligibility to the increment as part of his service conditions. His last pay drawn, for a purposes of fixation of pension was required to be determined after addition of such increments to which he was eligible notionally. The petitioner discharged the additional duties of Executive Engineer from March 1980 till his superannuation while holding the substantive rank of Assistant Engineer. Therefore, he was entitled to special allowance under Rule 103 of the Bihar Service Code for the said period. The claim was also made for leave encashment salary for 54 days wrongly denied to him on account of not counting the period of suspension for the purpose of duty. Interest was claimed on gratuity paid to him after 7 years along with a claim for refixation of gratuity after redetermination of the last pay drawn in the manner as aforesaid. Lastly, a claim was made for interest on all arrears of retirement and other services dues.

5. Learned Counsel for the State opposing the writ application submitted that orders for reduction of the pension to 70% under Rule 139 of the Bihar Pension Rules was passed after punishment imposed upon him in two departmental proceedings. His services had therefore not been thoroughly satisfactory and there was proof of grave misconduct while he was in service. This Court in CWJC No. 11352 of 1993 passed no orders with regard to the order of reduction of pension. Even in CWJC 4450 of 1997 no orders were passed with regard to the same. He, therefore, submitted that the order for reduction of pension to 70% was barred by constructive res judicata for which he relied upon a decision of the Supreme Court reported in State of U.P. Vs. Nawab Hussain, It was next submitted that the order-dated 6.5.1998 was passed after consideration of the representation filed by the petitioner in pursuance of the order in CWJC-No. 4450

of 1997. The petitioner therefore had full opportunity to present his case and in fact did so. There has therefore been substantial compliance with the provisions of Rule 139(C) of the Bihar Pension Rules and no prejudice has been caused to the petitioner. To require fresh notice to the petitioner under Rule 139(C) and orders to be passed fresh thereafter was a useless formality. In support of his submissions, learned Counsel relied upon the judgments of the Supreme reported in State Bank of Patiala and others Vs. S.K. Sharma, and Canara Bank Vs. V.K. Awasthy,

6. It was next submitted that this Court in CWJC No. 9070 of 1997 by judgment dated 29.11.2007 had not set aside his orders of punishment, upheld by the appellate authority, on merits, but had only remanded the matter to the disciplinary authority for reasons of certain procedural non-compliance. The matter still remains pending. A fresh order of punishment, if any to be imposed, would have to be in context of his superannuation. The claim for full pension at this stage was thus not tenable. By the order dated 3.5.1994 the period of suspension has been directed to be counted for the purpose of reckoning of his pensionary service only and nothing else is payable to him for the suspension period except subsistence allowance. The petitioner was therefore not entitled to have his increments computed notionally for the purpose of refixation of his pension. In any event, he had been denied the increments as a punishment. As the suspension period is not to be counted for service purpose denial of 54 days earned leave by grant of 186 days of earned leave from 240 days eligibility was not erroneous and required no interference. Placing reliance on Rule 85 of the Bihar Service Code, it was submitted that increment is admissible only for the period spent on duty and not otherwise. The petitioner was not on duty because of his order of suspension and has been denied increments as a punishment. The question of grant of any notional increment for the purpose of refixation of his last pay drawn does not arise.

The Court has considered the submissions made on behalf of the parties.

7. By order dated 3.5.1994, the petitioner has been denied salary for the period of his suspension from 25.8.1981 to 7.5.1990. However the same period has been held to count for the purpose of his pensionary benefits only. Rule 97(1) and (3) of the Bihar Service Code relevant for the present purpose provides as follows:

97.(1) When a Government servant who has been dismissed, removed, or suspended is reinstated, the authority competent to order the reinstatement shall consider and make specific order -

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty, and

(b) whether or not the said period shall be treated as a period spent on duty.

(3) In other cases, the Government servant shall be given such proportion of

such pay and allowances 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 allowance are admissible.

8. This Rule has been the subject of interpretation by this Court on more than one occasion and more recently by a Division Bench of this Court in Dinesh Prasad Vs. State of Bihar and Others, In paragraph 9 of the judgment, it has been noticed as follows:

9. Apart from these questions, so far the main question for which this matter has been referred, is concerned, it appears that for imposing the punishment No. (iii) that the petitioner shall not get anything for the period of suspension save and except the subsistence allowance, the disciplinary authority was required to give separate show cause notice to the delinquent in terms of Rule 97(3) of the Code. This part of the order, therefore, is not permissible in absence of any such notice to the delinquent employee.

9. In the present case, there is nothing on record to suggest that the Respondents have complied with the requirement of notice to the petitioner before issuance of the order-dated 3.5.1994 withholding his salary for the period of suspension. In view of the authoritative pronouncement by the Division Bench of this Court as noticed above in the case of Dinesh Prasad (supra), this Court holds that the petitioner shall be entitled to his salary for the period of suspension. If this period is deemed to be spent on duty, naturally he is also entitled to earned leave of the additional fifty four days.

10. Increment has a definite concept in service laws. It is an increase or addition on a fixed scale resulting in a regular increase in salary while the scale remains consistent. Increment is therefore necessarily co-related to salary. The entitlement to salary and consequent increment flows out of contract of employment and is a condition of service. So long as the contract of employment subsists, the employee is entitled to his salary. The fact that he may have been paid only subsistence allowance that was a part of the salary admissible under the Rule 96 of the Bihar Service Code during the period of suspension will not detract from the continued relationship of master and servant. While the relationship of master and servant subsists along with eligibility to salary that any part may have been denied as a measure of punishment does not take away his eligibility to the same. Should there be a break in service, cessation of the relationship, and consequent ineligibility to salary, the matter would be entirely different. This Court can do better than to rely upon the judgment in the case reported in Andhra Pradesh State Road Transport Corporation (A.P.S.R.T.C.) and Others Vs. Abdul Kareem, The labour court directed that reinstatement would be without back wages. The employee staked his claim for benefit of increments notionally earned during the period he was not on duty when he was out of service. The Supreme Court in the relevant extract at paragraph 11 held as follows:

...It would be incongruous to suggest that an employee, having been held guilty and remained absent from duty for a long time continues to earn increments though there is no payment of wages for the period of absence.

The right to receive increments was directly associated with the right to wages. In the present case there has been no (sic) of service or absence from duty. He has only been given lesser salary for a specified period under the Rules. This Court has already held that he is entitled to his full salary for the period of suspension. The respondents seek to deny notional increments for refixation of pension only in absence of appropriate orders in respect thereof while holding on 3.5.1994 that he shall be entitled to no benefits for the period of suspension.

11. This Court, therefore, holds that the actual denial of financial benefit of the increments with cumulative effect to the petitioner as a measure of punishment is quite distinct from his eligibility to the increment under his service conditions. The refusal to give the actual financial benefit of the increment, does not derogate from his eligibility under the service conditions to receive the same. The period of suspension has in fact been counted for the purpose of his pensionary service. This Court therefore holds that the petitioner is entitled to have his increments for the period of his suspension counted notionally only for the purposes of his last pay drawn and consequent refixation of his pension. As a result, the gratuity and other retirement dues are also required to be redetermined.

12. Rule 103 of the Bihar Service Code provides as follows:

103. The pay of a Government servant appointed by the State Government to hold substantively, as a temporary measure, or to officiate in, two or more independent post at one time shall be regulated as follows:

(a) the highest pay to which he would be entitled if his appointment to one of the posts stood alone, may be drawn on account of his tenure of that post;

(b) for each other post he may draw such reasonable pay, in no case exceeding half the presumptive pay (excluding overseas pay) of the post, as the State Government may fix; and

(c) if a compensatory allowance is attached to one or more of the post's he may draw such compensatory allowance as the State Government may fix provided that such allowance shall not exceed the total of the compensatory allowance attached to all the posts.

This has been the subject matter of consideration in several judgments of this Court and needs no reiteration presently.

13. This Court, therefore, holds that the petitioner shall be entitled to compensatory allowance under the Rules for the period from March 1980 till his superannuation when he held additional charge as Executive Engineer while holding the substantive post of Assistant Engineer.

14. In the present case, punishment was imposed on the petitioner while he was in service. He superannuated on 31.10.1990. His departmental appeals against the orders of punishment were pending on that date. The orders for his pension were passed on 4.3.1994 as modified on 9.3.1994 reducing the same to 70%. The petitioner has himself acknowledged at paragraph 23 of his writ petition that the order for reduction of his pension under Rule 139 of the Bihar Pension Rules would depend on the outcome of the two departmental appeals preferred by him which were sub judice in CWJC No. 9070 of 1997. By judgment dated 29.11.2007 in CWJC No. 9070 of 1997 the matter has been remanded to the disciplinary authority for a fresh determination of the punishment, if any, in view of procedural irregularity. The order for reduction of pension dated 9.3.1994 under Rule 139 of the Bihar Pension Rules cannot be seen in isolation and tested only under Rule 139(C) of the Bihar Pension Rules, but has to be seen in continuity from the date of punishment in service, his retirement, the orders of this Court in CWJC No. 4450 of 1997 and CWJC No. 9070 of 1997.

15. In the case of Sharda Prasad Sinha (*supra*) relied upon by the petitioner in support of the submission that the order under Rule 139 of the Bihar Pension Rules was bad for non compliance of Rule 139(C), the facts were entirely different. The petitioner therein superannuated on 31.7.1994. There were no proceedings pending much less any order of punishment as on that date. His pension was sanctioned on 27.7.1994. Show cause under Rule 139 of the Bihar Pension Rules was issued on 8.6.2004, after six years which was prohibited under Rule 139(C). It was in that background that the judgment came to be rendered. Such is not the case presently.

16. Nonetheless, this Court does not concur with the submission on behalf of the Respondents that the representation filed by the petitioner in pursuance of the directions of this Court in CWJC No. 4450 of 1997 and the final orders thereupon by the respondents were substantial compliance of Rule 139(C) of the Bihar Pension Rules and, therefore, the order requires no interference. Rule 139(C) specifically states that no such power shall be exercised without giving the pensioner concerned reasonable opportunity of showing cause against the action proposed to be taken. He may have filed a representation which was required to be considered is entirely a different matter from the decision that the authority may arrive at upon such representation. If they were not satisfied of the representation and proposed to impose punishment under Rule 139 they were statutorily required to issue him a notice. It is not the case of the Respondents that prior to issuance of the order dated 9.3.1994 any show cause notice for reduction of pension to 70% has been issued to the petitioner.

17. This Court does not concur with the submission on behalf the Respondents that no prejudice has been caused to the petitioner by reason of non compliance with statutory procedure, under Rule 139(C) of the Bihar Pension Rules relying upon the case of State Bank of Patiala and others (*supra*). The facts of the case relied upon were substantially different. The question therein was the non

compliance of Regulation 68(b)(3) of the State Bank of Patiala (Officers) Service Regulation 1979, in departmental proceeding against the respondent. The Apex Court noted that the right of the delinquent was only to receive copies of statements of witnesses recorded earlier. There was no right to be supplied documents and that the delinquent was only entitled to inspect the documents and make notes and that had been done. It was held that the right to receive the statements of witnesses was undoubtedly a statutory right and could be waived. The respondent therein did not raise any objection during the enquiry that the non furnishing of the copies of the statements of witnesses is disabling him or has disabled him from cross examining the witnesses or to defend himself. That therefore there had been substantial compliance of the principles of natural justice and it could not be held that there had been no fair hearing or fair enquiry. The conclusion of the discussion on natural justice, procedural non-compliance and substantial compliance is summarized at paragraph 33 of the judgment. This Court considers it proper to quote sub-paragraphs 3, 4(a) & (b) and 5 of paragraph 33 relevant for the present purpose.

33. We may summarize the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by the employer upon an employee):

(emphasis supplied)

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under - "no notice", "no opportunity" and "no hearing" categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted there from, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly provided that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e.

whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere)

18. Examining the present controversy in the above background, there has been not simply non compliance of the principles of natural justice but non compliance

of statutory procedure. There has been no waiver of statutory rights and it cannot be urged that the petitioner has not been prejudiced by the reduction of his pension the only source of income in the evening of his life. In the case of Ram Dayal Rai Vs. Jharkhand State Electricity Board and Others, a reduction of 5% of pension was held to be irreparable loss and injury as it was the only source of income for a retired Government employee. To this Court the case of the petitioner falls squarely under paragraph 33 sub-paragraph (3) of the aforesaid case, "no opportunity" and "no hearing". The Useless formality theory urged on behalf of the Respondents by placing reliance on the case of Canara Bank (supra) also does not impress this Court. The respondent therein was subjected to departmental enquiry, he preferred an appeal, was given a personal hearing by the appellate authority. The respondent at no stage had raised any objection with regard to any violation of natural justice causing prejudice to him. In that background the Apex Court relied upon the theory of useless formality. The facts as presently noticed are far different. To this Court the entire issue remains speculative at this stage in view of the order of remand passed in CWJC No. 9070 of 1997. What may or may not happen in pursuance of the order of remand is not for this Court or for the parties to speculate at this stage. Suffice it to say that the order dated 9.3.1994 reducing the pension to 70% is bad on the face of it for non-compliance of the statutory procedure under Rule 139(C) of the Bihar Pension Rules in as much as no opportunity to show cause was given to the petitioner before issuance of the same.

19. The order dated 9.3.1994 reducing pension to 70% is accordingly, set aside. Relying upon 2002 (1) PLJR 775 (State of Bihar v. Gauri Shankar Sinha) this Court directs that the Respondents shall be at liberty to proceed afresh with regard to the same depending upon the final orders that may be passed in the two departmental proceedings upon the order of remand in CWJC No. 9070 of 1997. The petitioner shall be entitled to 9% simple interest till today on all his service dues allowed. He shall be entitled to 9% simple interest on his payable retirement dues as may be determined upon conclusion of the departmental appeal after remand. The dues shall carry such interest till 29.11.2007 when C.W.J.C.9070 of 1997 was remanded and thereafter from the date that the departmental proceedings are required to be concluded by the order dated 29.11.2007 in C.W.J.C. 9070 of 1997, till such payment be made.

The writ application is allowed to the extent indicated with directions.