
(2011) 04 PAT CK 0073
In the Patna High Court
Case No : C.W.JC. No. 86 of 2006

Raghubansh Tiwary

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:

Citation : (2011) 04 PAT CK 0073

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—The Petitioner was a clerk in the Health Department posted in the district of Rohtas. In contemplation of a departmental proceeding in relation to illegality in respect of procurement of medicines from the Medicine Store Depot, Calcutta, the Petitioner was suspended on 8.3.1999. A preliminary enquiry report was submitted on 15.7.1999. The Petitioner remained suspended. The Petitioner against this suspension, moved this Court by filing CWJC No. 11817 of 1999, which was disposed of, without favourable order, on 13.1.2005. Against the said order of this Court, Petitioner preferred L.P.A. No. 124 of 2005, which was disposed of by order dated 17.2.2005, which is Annexure-1 to the writ petition. This Court, inter alia, took an undertaking from the Secretary, Department of Health to recall the order of suspension and complete the enquiry within a period of four months because the matter had been pending for almost six years without any progress. Accordingly, on 17.2.2005, the suspension of the Petitioner was revoked and soon thereafter, on 4.4.2005, an enquiry report was submitted. The enquiry report noticing various controversies, in fact, held that there was no material to prove the charges against the Petitioner but there was strong suspicion of Petitioner's involvement in the illegality that was committed. The enquiry report having been submitted and apparently the disciplinary authority being the Director-in-Chief, Health Services, Bihar, disagreeing with him, issued a show cause notice to the Petitioner under memo No. 507 (4), dated 4.6.2005 (Annexure-E to the State's counter affidavit) . In the show cause it is stated that in view of enquiry report, which was supplied to the Petitioner, the Petitioner comes within the ring of suspicion and as such he should show

cause in terms of Rule 43 (b) of the Bihar Pension Rules, why order be not passed for restricting the pensionary benefit to 50 percent. It appears that the Petitioner did not respond. Accordingly, a fresh notice was issued on 27.8.2005, which is Annexure-9 to the writ petition, reiterating the same. On 6.10.2005, Petitioner filed his show cause.

2. As the Petitioner had been under suspension for almost six years without being paid his full remuneration, the present writ application was filed with a prayer for a direction to the State to make full payment of his remuneration for the period of suspension. The writ petition having been filed during its pendency, on 6.2.2006, a punishment order was passed holding that in view of charges as against the petitioner and the Petitioner having been found guilty, he will not be entitled to any further remuneration for the period of suspension. By interlocutory application, the Petitioner has sought further relief, inter alia, for quashing the order of punishment, dated 6.2.2006.

3. The pleadings being completed with the consent of the parties, this application, has been heard at length for disposal at this stage itself.

4. On behalf of the State, it is submitted that against the order of punishment dated 6.2.2006, the Petitioner has statutory remedy of appeal, which the Petitioner should have availed. The Petitioner in the interlocutory application itself has stated that after punishment order was received, the Petitioner had filed a representation before the Chief Secretary, Government of Bihar, Patna, which has remained un-disposed of. There is no response to this by the State. In my view, having kept this application pending in this Court for over five years and the representation having remained pending for last five years before the Chief Secretary it would be travesty of justice in relegating the Petitioner to alternative remedy once again. State having been reminded through Petitioner's affidavit that his representation was pending, could have taken steps to dispose of the same but it has chosen to ignore it. It cannot now prolong agony of the Petitioner.

5. On behalf of the Petitioner it is submitted that the very notice being the second show cause notice is invalid on two grounds, firstly, it does not give any finding of guilty as against the Petitioner. With reference to enquiry report it is submitted that the enquiry report itself did not find the Petitioner guilty nor did it find any of the charges established. All it vaguely stated therein about suspicion of Petitioner's involvement. In the second show cause notice also an equally vague statement is there. It only mentions that as per enquiry report you come within the circle of suspicion. There is no finding of guilty. The second ground of attack is that the punishment, as proposed, is clearly without jurisdiction, inasmuch as it clearly mentioned about applying Rule 43 (b) of the Bihar Pension Rules which provides reduction of pension, that is not one of the punishments, which are contemplated for an employee who has yet to retire.

6. At this stage it may be noted that there is no dispute that the Petitioner re-

tired subsequent to the aforesaid order or order of punishment. He was very much in service when the order was passed and, therefore, Rule 43 (b) has no application. We will consider this submission appropriate.

7. The notice having been issued, the Petitioner responded and then he was visited with the so called order of punishment dated 6.2.2006. In the said order it is stated that the charges against the Petitioners have been partially proved and, therefore, upon Petitioner's superannuation he would not be entitled for any further payment in respect of the period of suspension. With this punishment, the departmental proceedings are closed. This is Annexure-11 to the supplementary affidavit of the Petitioner.

8. This order (Annexure-11) is challenged by the Petitioner on the ground that it is a non-speaking order. It is further submitted that it shows total non-application of mind when it holds out upon Petitioner having superannuated, the Petitioner would not be entitled to any amount for the period of suspension and lastly it is submitted that with-holding of payment for the period of suspension was not proceeded by the show cause notice in this regard in terms of Rule 97 (3) of the Bihar Service Code. This part of the punishment was bad. For the last part of submission, learned Counsel for the Petitioner relied on a Division Bench judgment in the case of Shri Mahabir Prasad Vs. The State of Bihar and Others, which has been followed in the case of Dinesh Prasad Vs. State of Bihar and Others, and recently in the case of Pawan Kumari v. The State of Bihar and Ors. since reported in 2010 (2) PLJR 602. The basis of these judgments is that in such a situation apart from issuing show cause against proposed punishment, a further second show cause for with-holding payment of remuneration during suspension period was to be issued. This Court had followed the judgment of Apex Court in M. Gopala Krishna Naidu Vs. State of Madhya Pradesh, in the case of M. Gopal Krishna Naidu v. State of Madhya Pradesh.

9. Having perused the judgment of the Apex Court, in my view, that was passed under totally different circumstances and was referring to Rule 54 of the Fundamental Rules. The Apex Court was clear that when a delinquent was fully exonerated of the charges, having not found guilty if even then and in spite of it, payment for the suspension period was to be with-held, which had civil consequences, notice was a must. That was not a case where notice of punishment was already there and a person was found guilty and liable to be punished. The two situations were fundamentally different. In these circumstances ordinarily I, sitting singly, am required to refer the matter to a Division Bench for reconsideration of the judgment of this Court but in the peculiar facts and circumstances of the case that situation does not arise, for the writ application has to be allowed on other ground itself without going into this question.

10. As noted above, the Petitioner has challenged the very second show cause notice on two grounds, as noted above. It is firstly on ground of vague-ness and the second that the proposed punishment is beyond the jurisdiction of the

authority. In my view, on both these counts, the notice cannot be sustained. As noted above, the notice states that you are in the ring of suspicion. Neither what is the ring and what is the suspicion is specified. The importance* of specifying this is there because this notice is a three fold notice. It is a notice invoking the jurisdiction to punish, it is a notice calling for an explanation and finally it is a notice of the proposed penalty. In the present case mere stating that the Petitioner comes in the ring of suspicion would not give jurisdiction to the authority to proceed in the matter at this stage as at this stage, to proceed there must be positive finding of guilt. Such a notice could be valid for initiation of a proceeding and not at stage of culmination of proceeding. Secondly, it gives no detail of any culpable act on the part of the Petitioner having been found. What would be the Petitioner's reply to and what would be Petitioner's defence to the charges are itself unclear. There is practically no defence. Lastly, the proposed punishment is beyond the jurisdiction of the authority inasmuch as the said punishment could not be imposed upon an officer who is still in service. The application of Rule 43 (b) of the Bihar Pension Rules starts with superannuation and not before that. Thus, on all three counts, the notice must go.

11. Now, we refer to the final order whereby punishment has been imposed being order dated 6.2.2006 (Annexure-11 to the supplementary affidavit of the Petitioner) . This order merely states that the charges have been partially proved. What charges in what manner and to what extent, nothing is stated. It must be remembered that this order was passed in a quasi judicial proceeding at the culmination of the disciplinary proceeding, which order is assailable in appeal. It must, therefore, be a reasoned order and/or speaking order. Learned Counsel for the State sought to substantiate the order with reference to the enquiry report or the finding therein. Firstly, the enquiry report itself clearly states that the charges could not be proved except there being a suspicion, which itself is absolutely vague. It is equally well settled in the case of M.S. Arill and Ors. v. The Chief Election Commissioner and Ors. since reported in 1978 S.C. 851 that a public order publicly made cannot be substantiated by affidavit or otherwise. It is not like an old wine which matures with age. Reference to the enquiry report to understand and find out the establishment of partial establishment of charges is thus impermissible. That secondly and more importantly order being an order passed by the authority in quasi judicial proceeding and the order being appeal-able, it has to be a speaking order. As the Apex Court has held in the case of Union of India (UOI) Vs. Mohan Lal Capoor and Others, and in particular para 28 thereof, reasons are the link between the facts found and the decision taken and a quasi judicial order unsupported by reason is a void order, the order cannot be sustained.

12. Learned Counsel for the State submitted that the order has been passed after application of mind. To me it is clear case of non-application of mind inasmuch as the Petitioner, who was in service was treated, as if he was superannuated, the disciplinary authority was not even aware of this fact i.e. non-application of mind. Even otherwise if we presume that the authority had applied

its mind, it may have little difference if no reasons are given. In other words, an order passed without application of mind cannot be sustained. This has been clearly held by the Apex Court in the case of Mahindra and Mahindra Ltd. v. The Union of India and Anr. since reported in AIR 1979 SC 798 wherein agreeing with the order of Commission, that the Commission had applied its mind to each and every clause to the trade agreement but having only given a finding whether it was a restrictive or not, without reason, vitiates the order. Thus, even on this count, the final order cannot be sustained.

13. Before parting I may notice one aspect of the matter, which needs to be noticed though is not relevant for the decision. In this scam which is commonly referred to as MSD Scam, the Petitioner was proceeded against in a criminal investigation by the C.B.I. Upon conclusion of investigation, the Petitioner was exonerated and not sent up for trial while others were charge sheeted.

14. In view of the aforesaid, I have no option but to set aside the order concluding departmental proceeding as non est and invalid in law. The consequence would be that the Petitioner would be entitled to full remuneration for the period under suspension. The order being order dated 6.2.2006 passed by the Director-in-Chief, Health Services, Government of Bihar, Patna, is hereby quashed.

15. With the aforesaid observation and direction the writ application is thus, allowed.