

(2013) 03 JH CK 0106
In the Jharkhand High Court
Case No : W.P. (S) No. 5047 of 2002

Rajendra Prasad

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

Citation : (2013) 2 JLJR 476

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Judgement

S. Chandrashekhar, J.—The petitioner has challenged the orders dated 27.06.2001, 20.05.2002/31.05.2002. The petitioner was proceeded against in a departmental inquiry and the mis-conduct alleged has been found proved and therefore, the order of punishment dated 27.06.2001 has been passed and his appeal has also been rejected by the appellate authority and therefore, he has approached this Court. The petitioner who was working as an accounts clerk, was placed under suspension and a departmental proceeding was initiated against him on 12.12.1997. A charge memo was served upon the petitioner on 03.02.1998 and he submitted his reply on 25.05.1998. The petitioner moved the High Court in CWJC No. 2221 of 1997 (R) in which the respondents were directed to conclude the departmental proceeding within a period of 05 months failing which the suspension order was to be withdrawn. Since order dated 20.05.1998 was not given effect to, the petitioner filed contempt case bearing MJC No. 110 of 1999 (R). However, the suspension order was revoked and therefore, the contempt proceeding was dropped. The petitioner again moved the High Court in CWJC No. 2407 of 2000 (R) because the departmental proceeding was not concluded even after two years. The High Court disposed of the writ petition with the direction to the respondents to conclude the departmental proceeding within a period of two months from the date of receipt of a copy of the order, failing which the departmental proceeding was to be stood revoked. It is the case of the petitioner that the departmental proceeding was not concluded as directed by the High Court within the period of two months, still order dated 27.06.2001 was

passed imposing various penalties on the petitioner. The petitioner preferred an appeal against the order dated 27.06.2001. However, as his appeal was not disposed of he moved the High Court again in W.P. (S) No. 1814 of 2002 which was disposed of on 19.03.2002 directing the appellate authority to decide the appeal of the petitioner within a period of three months. The appellate authority rejected the appeal of the petitioner by order dated 20.05.2002 and therefore, the petitioner has approached this Court by filing the present writ petition.

2. A counter-affidavit has been filed in which it has been pointed out that in compliance of order dated 04.08.2000 passed by the High Court in W.P. (S) 2407 of 2000 (R), the departmental proceeding was started however, due to suspension of the Regional Deputy Director of Education, Palamau the post remained vacant between the period 19.09.2000 and 09.05.2001 and therefore the departmental proceeding could not be completed within the stipulated time. The allegations against the petitioner is of mis-behaving with a lady officer and a case was also registered in the police station in this connection. The charge against the petitioner has been found proved and therefore, he has been punished. The order of penalty is just and proper and it does not require any interference by this Court.

3. Heard learned counsel for the parties and perused the documents on record.

4. The learned counsel for the petitioner has raised the contention that since the departmental proceeding was not concluded within the stipulated period of two months as directed by the High Court in C.W.J.C. No. 2407 of 2000 (R), the departmental proceeding stood concluded on 09.10.2000 and therefore, the penalty order dated 27.06.2001 is illegal. In support of his contention, the learned counsel for the petitioner has relied on the judgment of this Court in the case of "Shambhu Kant Dubey versus State of Jharkhand" reported in (2005) 3 JLR 141. The learned counsel has further submitted that in view of letter dated 07.10.1997 it becomes clear that the petitioner could not join his duties because in the order of transfer the place of posting was wrongly mentioned. He has further submitted that the order, that during the period of suspension he would not be entitled for anything except the subsistence allowance, is bad in law because he was not issued any show-cause notice in terms of Rule 97(3) and (5) of the Jharkhand Service Code.

5. On the other hand learned counsel for the respondents has relied on the statement made in paragraph No. 9 of the counter-affidavit which is extracted below

9. That with regard to the statement made in paras 10 & 12 of the writ petition it is submitted that from perusal of Annexure-A it would be evident that inspite of direction of Hon''ble Court (Annexure-4) the petitioner purposely not co-operated this deponent in departmental enquiry. It is further submitted that from perusal of Annexure-4 it would be evident that though the petitioner appeared before the Conducting Officer but not co-operated in departmental proceeding and as such

in the light of direction of Hon''ble Court there is no question for Asking the petitioner by the Enquiry Officer or by the disciplinary authority in respect of co-operating in the departmental proceeding.

6. Without going into the sustainability of the order of penalty dated 27.06.2001 on the ground of non-compliance of order dated 04.08.2000 passed by the High Court in C.W.J.C. No. 2407 of 2000. I find that the penalty No. 1 is not sustainable in the face of Annexure-12 which is the letter dated 07.10.1997 issued by the Regional Deputy Director of Education, South Chottanapgur Division, Ranchi. In the said letter as rightly pointed out by the learned counsel for the petitioner the place of posting has been wrongly mentioned. The order of transfer was issued on 17.02.1997 and the letter contained in Annexure-12 has been issued on 07.10.1997 and on the basis of Annexure-12, the learned counsel has submitted that this was the reason for not joining the post on time. I am inclined to accept the submission of the counsel for the petitioner.

7. Adverting to the submission of learned counsel for the petitioner that a separate show-cause notice was required to be issued before the order was passed holding that the petitioner was entitled for subsistence allowance only, during the period of suspension, I find that in the case of Sharafat Hussain Vs. State of Bihar and Another, , this Court has held that before resorting to Rule 97 of the Bihar Service Code a second Show-Cause Notice is required to be issued to the employee.

8. Rule 97 of the Bihar Service Code and Rule 54 of the Fundamental Rules are pari-materia Rule 97 of the Bihar Service Code is extracted below:

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

(a) regarding the pay and allowance 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.

(2) Where the authority mentioned in sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension, that it was wholly unjustified, the Government servant shall given full pay and allowance to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be.

(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.

(4) In a case falling under clause (2), the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause (2) the period of absence from duty shall not be treated as period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desires such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant.

Fundamental Rule 54 is as follows:

(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 a specific order-

(a) Regarding the pay and allowance 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;

(2) Where the authority mentioned in sub-rule(1) is of opinion that the Government that the Government servant has been fully exonerated or in the case of suspension, that it was wholly unjustified, the Government servant shall be given the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or suspended, as the case may be.

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent allowances are admissible:

Provided that the payment of allowances under clause(2) or clause (3) shall be subject to all other conditions under which such allowances are admissible.

Provided further that such proportion of such pay and allowances shall not be less than the subsistence and other allowances admissible under Rule 53.

(4) In a case falling under clause (2), the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause(3), the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs that it shall be so treated for any specified purpose:

Provided that if the Government servant so desired, such authority may direct that the period of absence from duty shall be converted into leave of any kind due and admissible to the Government servant

9. In the case of M. Gopala Krishna Naidu Vs. State of Madhya Pradesh, , the Hon"ble Supreme Court while examining Fundamental Rule 54 has held as under:

(6) It is true that the order under F.R. 54 is in a sense a consequential order in that it would be passed after an order of reinstatement is made. But the fact that it is a consequential order does not determine the question whether the

government servant has to be given an opportunity to show cause or not. It is also true that in a case where reinstatement is ordered after a departmental inquiry the government servant would ordinarily have had an opportunity to show case. In such a case, the authority no doubt would have before him the entire record including the explanation given by the government servant from which all the facts and circumstances of the case would be before the authority and from which he can form the opinion as to whether he has fully exonerated or not and in case of suspension whether such suspension was wholly unjustified or not. In such as case the order passed under a rule such as the present Fundamental Rule might be said to be a consequential order following a departmental inquiry. But there are three classes of case as laid down by the proviso in Art. 311 where a departmental inquiry would not be held viz., (a) where a person is dismissed, removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge, (b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied for reasons to be recorded in writing that it is not reasonably practicable to hold such an inquiry, and (c) where the President or the Governor as the case may be is satisfied that in the interest of security of the State it is not expedient to hold such inquiry. Since there would be no inquiry in these classes of cases the authority would not have before him any explanation by the government servant. The authority in such cases would have to consider and pass the order merely on such facts which might be placed before him by the department concerned. The order in such a case would be ex-parte without the authority having the other side of the picture. In such cases the order that such authority would pass would not be a consequential order as where a departmental inquiry has been held. Therefore, an order passed under Fundamental Rule 54 is not always a consequential order nor is such order a continuation of the departmental proceeding taken against the employee.

(7) It is true as Mr. Sen pointed out that F.R. 54 does not in express terms lay down that the authority shall give to the employee concerned the opportunity to show cause before he passes the order. Even so, the question is whether the rule casts such a duty on the authority by implication. The order as to whether a given case falls under CI. 2 or CI. 5 of the Fundamental Rule must depend on the examination by the authority of all the facts and circumstances of the case and his forming the opinion therefrom of two factual findings; whether the employee was fully exonerated and in case of suspension whether it was wholly unjustified. Besides, an order passed under this rule would obviously affect the government servant adversely if it is one made under CIs. 3 and 5. Consideration under this rule depending as it does on facts and circumstances in their entirety, passing an order on the basis of factual finding arrived at from such facts and circumstances and such an order resulting in pecuniary loss to the government servant must be held to be an objective rather than a subjective function. The very nature of the function implies the duty to act judicially. In such a case if an opportunity to show cause against the action, proposed is not afforded, as admittedly it was not

done in the present case, the order is liable to be struck down as invalid on the ground that it is one in breach of the principles of natural justice.

10. In the case of Ramashray Prasad Singh Vs. The State of Bihar and Others , it has held that any order of restricted payment of salary for the period of suspension can be made under Rule 97 of the Bihar Service Code only after giving the concerned employee an opportunity to show-cause. Similar view has been taken by the High Court in the case of Shri Mahabir Prasad Vs. The State of Bihar and Others, and in the case of Biswanath Mitra Vs. State of Bihar and Others .

11. From the record of the case, it does not appear that before the order with respect of subsistence allowance was passed, second show-cause notice was issued to the petitioner. The petitioner is employed under the Government. He can be deprived of his salary and allowances except the subsistence allowance during the period of suspension, only by resorting to Rule 97 of the Jharkhand Service Code (as adopted from Bihar Service Code) and since no second show-cause notice was issued to the petitioner the order contained under para (ii) in order dated 27.06.2001 is liable to be set-aside. However, the respondents would be at liberty to proceed in the matter, if so advised, in accordance with law.

12. In the result the penalty at serial no. (i) and (ii) in the order of penalty dated 27.06.2001 are quashed. The writ petition is partly allowed and disposed of in the aforesaid terms. There shall however, be no order as to costs.