

(2013) 11 JH CK 0006
In the Jharkhand High Court
Case No : Writ Petition (S) No. 7529 of 2012

Samir Kumar Lakra

APPELLANT

Vs

State of Jharkhand, Principal Secretary, Road Construction
Department, Special Secretary, Road Construction
Department and Deputy Secretary, Road Construction
Department

RESPONDENT

Date of Decision : 19-11-2013

Acts Referred:

Citation : (2013) 11 JH CK 0006

Hon'ble Judges : Shree Chandrashekhar, J

Bench : Single Bench

Advocate : S.N. Pathak, Rakesh Kumar Roy and Fayyaz Ahmad, for the Appellant; Srijit Choudhary and Rakesh Kumar Shahi, for the Respondent

Judgement

Shree Chandrashekhar, J.—The petitioner has approached this Court challenging orders dated 07.12.2011 and 09.08.2012. Further prayers for treating the period of suspension as period spent on duty and payment of salary for the period between 29.05.2010 and 24.09.2011 have also been made. The brief facts of the case are that, the petitioner was appointed as Assistant Engineer (Mechanical) in the year, 1997. In the year, 2009 the petitioner was promoted on the post of Executive Engineer and was made In-charge Department of Road Construction, Mechanical Division. On 29.05.2010, the petitioner was put under suspension and a departmental proceeding was initiated against the petitioner in which a charge-memo was issued to the petitioner on 30.08.2010 framing as many as six charges. On conclusion of the enquiry, the enquiry officer found charges not proved. Accordingly, a second show-cause notice was issued to the petitioner by the disciplinary authority and after considering the reply to the second show-cause notice, the penalty order dated 07.12.2011, inflicting penalty of "Nindan" and an order for payment of subsistence allowance only for the period of suspension, has been passed against the petitioner. The petitioner preferred an appeal which allegedly has been dismissed by the appellate authority by order

dated 09.08.2012.

2. A counter-affidavit has been filed, by the respondent No. 4 stating as under.

9. That it is humbly stated and submitted that the conducting officer of the aforesaid departmental proceeding had not proved] any of the six charges leveled against the petitioner. But the disciplinary authority disagreed with the findings of the enquiry report of the Conducting Officer during the course of its review. Therefore a second show cause was asked form the petitioner alongwith the enquiry report of the conducting officer vides letter No. 5679 (5) 03.09.2011, wherein the reasons of disagreement were also explained.

In the meanwhile petitioner's suspension was revoked vide notification No. 6377 (S) dated 24.09.2011, wherein the decision of his suspension period was kept pending subject to result of the departmental proceeding initiated against him.

17. That with regard to the statement made by the petitioner in paragraph-2(e) to (i), in the instant writ petition under reply, it is humbly stated and submitted that the petitioner had not been exonerated from all the charges leveled against him, therefore according to the provisions laid down in rule-97 of the Jharkhand Service Code he is not entitled for the salary of his period of suspension.

3. The learned Senior Counsel appearing for the petitioner has raised two fold contentions namely, (i) in view of the specific finding recorded by the enquiry officer, the order of penalty dated 07.12.2011 is not sustainable in law and, (ii) before passing an order with respect to the period of suspension, the authority concerned was under a duty to issue a second show-cause notice which admittedly has not been done in the present proceeding and therefore, the impugned orders are liable to be quashed.

4. As against the above, the learned counsel for the respondents has submitted that since the petitioner was not fully exonerated from the charges leveled against him, the order of penalty dated 07.12.2011 has been passed. He has relied on a decision of the Hon"ble Patna High Court in Ram Chandra Ram Vs. State of Bihar and Others, to fortify his statement that, if a delinquent employee is not fully exonerated from the charges he would not be entitled for grant of full salary and allowance for the period during which he remained suspended.

5. On a perusal of the documents on record, I find that the enquiry officer has opined that the charges leveled against the petitioner were not proved. From the second show-cause notice dated 03.09.2011 issued to the petitioner, I gather that the disciplinary authority has decided to deal with the findings recorded by the enquiry officer only on suspicion and no material fact has been discussed by the disciplinary authority which were not taken into consideration by the enquiry officer. I further find that in the penalty order dated 07.12.2011 it has been ordered that the petitioner would not be entitled for anything except subsistence allowance for the period of suspension however, no separate second show-cause notice has been issued to the petitioner.

6. Rule 97 of the Jharkhand 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.

7. 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 Cl. 2 or Cl. 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 Cls. 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.

8. In the case of *Manzoor Ahmed Mazumdar v. State of Meghalaya*, (1997) 11 SCC 374. the Supreme Court has held that even though there is no express requirement in Fundamental Rule 54(3) for giving an opportunity to the employee before passing an order, giving of such an opportunity is implicit in the exercise of power which has been conferred by the said provision. It was, therefore, necessary for the competent authority to afford an opportunity to the employee before passing the order regarding pay and allowances payable to the employee in respect of the period of suspension.

9. From the aforesaid provision I find that before resorting to Sub-Rule 3 and 5 of Rule 97 of the Jharkhand Service Code the authority concerned was required to issue a second show-cause notice to the petitioner which admittedly has not been done in the present case and therefore, the order which has been passed by the disciplinary authority denying the salary and allowance to the petitioner during the period of suspension is not sustainable. Adverting to the contention raised on behalf of the learned counsel appearing for the respondents that if a delinquent employee is not fully exonerated from the charges, he would not be entitled for grant of full salary and allowance during the period of suspension, I find that in the judgment in Ram Chandra Ram Vs. State of Bihar and Others, the Hon"ble Patna High Court has not considered the issue whether a second show-cause was required to be issued to the delinquent employee or not. I further find that in Basishta Prasad Sinha Vs. The State of Bihar and others, a co-ordinate Bench of the Hon"ble Patna High Court has held that before denying a delinquent employee the benefit of full salary and allowance, a second show-cause notice is required to be issued under the provisions of Rule 97 of the Jharkhand Service Code. In view of the aforesaid, the impugned order dated 07.12.2011 is hereby quashed. The respondent-authority would take a decision in accordance with law, in so far as, prayer for full salary and allowances during the period of suspension and for treating the period under suspension as period spent on duty, are concerned. The writ petition is disposed of in the aforesaid terms.