
(1999) 02 PAT CK 0040
In the Patna High Court
Case No : C.W.J.C. No. 2684 of 1996

Smt. Dipali Kundu

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 08-02-1999

Acts Referred:

Citation : (1999) 1 BLJR 549

Hon'ble Judges : Ashish N. Trivedi, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Ashish N. Trivedi, J.—The petitioner in this Writ Petition has prayed for directions to the Respondents for payment of full salary for the period commencing from 27.11.1978 till 20.4.1987 after adjustment of the subsistence allowance paid to the Petitioner.

2. During the pendency of the Writ Petition the Director, Social Welfare. Bihar, Patna by his order No. 1764 dated 29.6.1996 (Annexure "11") issued directions that the Petitioner will not be entitled to any allowance or salary in terms of Rule 97(5) of the Bihar Service Code except the subsistence allowance paid to her during the period of suspension and further that for the purposes of pension etc. the period of suspension will be treated as the period spent on duty. This order dated 29.6.1996 (Annexure "11") has been challenged by the Petitioner by moving an Application for amendment which had been allowed by this Court on 28.8.1997 while admitting the Writ Petition.

3. The case of the Petitioner is that while she was working as a Matron she was suspended by the order dated 27.11.1978 (Annexure "1") and subsistence allowance was permitted to be drawn by her in terms of Rule 96 of the Bihar Service Code. Departmental Proceedings were initiated against the Petitioner which were concluded by the order dated 11.6.1981 (Annexure "3") dismissing the Petitioner from service. Being aggrieved the Petitioner challenged the

dismissal order in this Court in CWJC No. 2107 of 1981 and a Division Bench of the Court by the Judgment and order dated 3.5.1984 (Annexure "4") allowed the Writ Petition and quashed the dismissal order dated 11.6.1981 (Annexure "3") and further observed that the Respondents in that Writ Petition were at liberty to issue a second show cause notice against the proposed punishment being imposed upon the Petitioner and pass fresh order thereafter in accordance with law. Thereafter the Director, Social, Welfare, Bihar, Patna by his letter dated 23.7.1984 (Annexure "5") directed that the Petitioner shall be deemed to continue under suspension with effect from 11.6.1981 i.e. from the date from which the order of dismissal was passed, that is to say, the suspension order passed initially was continued. The petitioner was issued a second show cause notice dated 10.3.1986 (Annexure "6") by the Director, Social Welfare. Bihar, Patna in compliance of the directions of this Court and the Disciplinary Proceedings were concluded with the penalty of censure and stoppage of three increments but no order as regards the pay and allowances for the period of suspension and regularization of the period of suspension was passed In terms of Rule 97 of the Bihar Service Code at the time of imposition of the aforesaid penalty by the order dated 20.4.1987 (Annexure "7"). The Petitioner was thereafter allowed to join as a Matron in After Care Home, Patna. Being aggrieved on account of nonpayment of pay and allowances for the period of suspension and order for treating her on duty and regularization for the period of suspension she preferred an Appeal before the Secretary to the Government of Bihar, Welfare Department and also questioned the order of punishment dated 20.4.1987 (Annexure "7") but no order was passed by the Appellate Authority.

4. The petitioner being aggrieved once again filed CWJC No. 6996 of 1992 praying that the order of punishment dated 20.4.1987 (Annexure "7") be quashed and directions for payment of salary from 27.11.1978 to 20.4.1987 and first and second time bound promotions along with the arrears of salary be issued against the Respondents and in favour of the Petitioner.

5. A Division Bench of this Court by the order dated 12.1.1993 rejected the Writ Petition preferred by the Petitioner with the observation that the rejection of the Writ Petition is confined only to the grievance with respect to the order contained in Annexure "1" which in the present Writ Petition is Annexure "7".

6. The Petitioner then preferred the present Writ Petition alleging that the order of suspension had been passed retrospectively and after two years of reinstatement the petitioner was served second Show Cause Notice dated 10.3.1986 (Annexure "6") yet not order as envisaged under Rule 97 of the Bihar Service Code was passed by the Competent Authority and thus the Petitioner was denied full salary for the period of suspension from 27.11.1978 to 20.4.1987.

7. As noticed above the petitioner during the pendency of the Writ Petition was served with the order dated 29.6.1996 (Annexure "11") which was Issued by the Director, Social Welfare, Bihar, Patna in terms of Rule 97 of the Bihar Service Code which has also been question in this Writ Petition.

8. The Writ Petition has been opposed and a Counter Affidavit on behalf of the Respondents has been filed justifying the impugned order dated 29.6.1996 (Annexure "A") issued by the Director, Social Welfare, Bihar, Patna Respondent No. 3.

9. I have heard Mr. I.T. Gaur, learned Senior Counsel for the Petitioner and Mr. N.K. Sinha, learned GP. III appearing for the Respondents and have considered their submissions and the materials on record.

10. The contention of Mr. I.T. Gaur, learned Senior Counsel for the Petitioner is that it was incumbent for the Disciplinary Authority while reinstating the Petitioner as a consequence of setting aside of the order of dismissal by this Court to have simultaneously issued an order in terms of Rule 97 of the Bihar Service Code and in any event such an order ought to have been passed when the penalty of censure etc. was imposed upon her by the order dated 20.4.1987 (Annexure "7") and in not doing so the Petitioner is entitled to full salary for the period of suspension which period has also to be treated as having been spent on duty.

11. Mr. I.T. Gaur, learned Senior Counsel for the Petitioner further submitted that issuance of the impugned order dated 29.6.1996 (Annexure "A") issued by the Director, Social Welfare, Bihar, Patna. Respondent No. 3 is illegal as the same was passed not immediately after the conclusion of the Disciplinary Proceedings and the reinstatement of the Petitioner on 20.4.1987 and therefore the impugned order is liable to be set aside and the Petitioner is entitled to direction against the Respondent for payment of full salary for the period of suspension and also a further direction that the said period of suspension for all the purposes be treated as period spent on duty.

12. In support of his contention Mr. I.T. Gaur relied upon two decisions of the learned Single Judge in Chandradip Sharma v. The State of Bihar and ors. 1989 (1) BLJR 76 and Sheo Saran Prasad Vs. State of Bihar, and submitted that in view of these decisions the Petitioner is entitled to the reliefs claimed in the Writ Petition.

13. In Chandradip Sharma (supra) the order dated 2.2.1981 was passed by the Disciplinary Authority imposing penalty of stoppage of three increments and during the pendency of the Writ Petition another order dated 2.3.1988 had been passed directing that only subsistence allowance during the period of suspension of the Petitioner is admissible and no further amount shall be paid to him and these two orders were the subject matter of the Writ Petition.

14. I have carefully considered this decision specially paragraph 12 of the decision which reads as under-

It is well known that the question as to whether the period during which a delinquent officer is placed under suspension shall either be treated on leave or on duty must be decided by the disciplinary authority at the time of awarding

punishment itself. There does not appear any earthly reason as to why after a period of several years this order has been passed.

In Sheo Saran Prasad (supra) the reliefs claimed by the Petitioner were as under-

(i) for immediate fixation of his pay on the second and third revised scale of 1971 and 1981 respectively with promotion as given by the respondent No. 2 as per Annexures-1 to 4 series for immediate payment of Full pay and allowances from 6.1.1966 to September, 1969.

(ii) for immediate payment of all the arrears legal dues after fixing the revised scale and on the basis of promotion as per Annexures 1 to 4 series and payment of due earned leave salary from 5.8.65 to 28.10.65 and 16.12.65 to 5.1.66.

(iii) for payment of suitable compensation amount of initial torture by the respondents on account of illegality withholding the above dues arbitrarily and with mala fide intentions.

(iv) for payment of interest on the above amount by way of fixation of his salary and after hearing the parties and perusing the show cause if any, filed by the respondent be further pleased to make to rule order (s) direction (s) absolute.

It was observed in the said decision in paragraph 8 that-

An employee while placed under an order of suspension is entitled to his subsistence allowance but in the event he is reinstated in service, a direction in this regard has to be made by the authority at the time of passing of an order of reinstatement and/or an order revoking the order of suspension in terms of Rule 97 of Bihar Service Code.

Mr. Gaur further relied upon a decision of this Court in Basishtha Prasad Sinha Vs. The State of Bihar and others, , and submitted that it is incumbent for the Competent Authority to pass an order at the conclusion of the Departmental Proceedings as to whether the Government servant is entitled for pay and allowance for the period of suspension in terms of Rule 97(3) of the Bihar Service Code and whether in that situation the period in question is to be treated as the period spent on duty or absence from duty.

15. Mr. N.K. Sinha, learned Government Pleader III appearing for the State contended that when the order of dismissal dated 11.6.1981 (Annexure "3") was issued against the Petitioner it was also directed in the said order that the Petitioner was entitled for payment of subsistence allowance for the period during which she remained under suspension. Learned Government Pleader III contended that after disposal of CWJC No. 2107 of 1981 by the Division Bench of this Court by the Judgment and order dated 3.5.1984 (Annexure "4") the Departmental Proceedings did not come to an end and therefore she was rightly treated to continue under suspension in terms of Rule 3(a)(4) of the Bihar & Orissa Subordinate Services (Discipline and Appeal) Rules, 1934. He further submitted that although while concluding the Disciplinary Proceedings finally and

imposing penalty of censure and stoppage of three increments by the order dated 20.4.1987 (Annexure "7") no orders in terms of Rule 97 of the Bihar Service Code had been passed yet that by itself would not vitiate the impugned order dated 29.6.1996 (Annexure "H") passed In terms of Rule 97 of the Code.

16. Learned G.P. III submitted that soon after the issuance of the order dated 20.4.1987 (Annexure "7") imposing penalty of censure and stoppage of three increments the petitioner preferred an Appeal to the State Government (Annexure "8") on or about 18.8.1987 which remained pending and even in the second writ petition (C.W.J.C. 6996 of 1992) the order of penalty was not interfered by this Court as would be evident from the perusal of the order dated 12.1.1993 (Annexure "9") of this Court. Mr. N.K. Sinha, G.P. III submitted that there is nothing in Rule 97 of the Code to show that while reinstating a Government servant it is incumbent upon the Disciplinary Authority to simultaneously issue an order in terms of Rule 97 of the Code with regard to payment of salary and the period of suspension because such an order has to be passed only after giving an opportunity to such Government servant and after application of mind. Learned G.P. III stated that before such an order could be passed the Petitioner preferred Writ Petition and the Authorities were engaged in preparation of the Counter Affidavit etc. for opposition of the Writ Petition.

17. I have considered the submissions made by the learned Counsel for the parties and the materials on record.

Rule 97 of the Bihar Service Code reads as under:

(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 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 the opinion 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 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 allowance as such competent authority may prescribed.

Provided that the payment of allowance 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 (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 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.

18. From the perusal of the averments made in the Counter Affidavit filed on behalf of the Respondents by Sri Ramjit Singh, Deputy Director, Social Welfare it appears that there is no explanation as to what prevented the Competent Authority i.e. the Director, Social Welfare, Bihar, Patna, Respondent No. 3 from making an order as envisaged under Rule 97 of the Bihar Service Code when the Disciplinary Proceedings were concluded against the Petitioner by imposition of penalty of censure and stoppage of three increments by the order dated 20.4.1987 (Annexure "7") and she was reinstated. There had to be some good reason and explanation to be offered by the Respondents more so by the Respondent No. 3, the competent Authority to explain as to why did he not make an order as envisaged under Rule 97 of the Code while concluding the Disciplinary Proceedings and what was the justification in issuing the Second show Cause Notice to the Petitioner on 24.6.1995 i.e., almost 9 years after the Petitioner was reinstated and her suspension was revoked and making an order in terms of Rule 97 of the Code by the impugned order dated 29.6.1996 (Annexure "11") issued by the Director, Social Welfare, Bihar, Patna, Respondent No. 3.

19. In *Basttha Prasad Sinha (supra)*, the Division Bench following the judgment of this Court in *Dr. Lakshmi Narain Singh v. State of Bihar and Ors.* 1989 BBCJ 147, observed that-

... It was, however, held that Rule 97 of the Bihar Service Code ("Code" in short) enjoins the competent authority to pass an order at the close of the departmental proceeding as to whether the Government Servant is to be paid full pay and allowance for the suspension period in terms of Rule 97(3) and whether, in that situation, the period in question is to be treated as spent on duty or absence from duty....

The Division Bench further observed that-

It would appear from bare perusal of the rule that at the time of reinstatement of a Government servant who was dismissed, removed or suspended, the competent authority is required to make specific order as to the entitlement of the person concerned to his pay and allowance with respect to the period of suspension and whether the period is to be treated as spent on duty or not, as per Clause (1). Where the delinquent is fully exonerated by the competent authority or where the authority thinks that the suspension was wholly unjustified, he will as of right be entitled to full pay and allowance. However, in all other cases where the person is not fully exonerated or the suspension is not

found to be wholly unjustified, the competent authority has to take a decision as to the entitlement of the delinquent to pay and allowance. In other words, in all other cases not covered by Clause (2) it is open to the competent authority to direct payment of only part of pay and allowances. Again. In cases covered by Clause (2), the period of absence has to be treated as a period spent on duty for all purposes but in cases covered by Clause (3), that is in all other cases, a discretion is again vested in the competent authority to decide as to whether the period shall be treated as absence from duty, or spent on duty for any specific purpose. An order directing that the Government Servant concerned shall not be entitled to pay and allowance save and except the subsistence allowance, and directing that the period in question shall be treated as absence from duty has to be passed by the competent authority in every case at the stage of final conclusion of the departmental proceeding....

20. Admittedly the departmental proceeding against the Petitioner was concluded by the order dated 20.4.1987 (Annexure "7") it was necessary for the Competent Authority to pass an order under Rule 97 of the Bihar Service Code immediately on the conclusion of the departmental proceeding the Respondents did not pass an order as envisaged under Rule 97 of the Bihar Service Code and there is no explanation whatsoever by the Respondent No. 3 in the Counter Affidavit as to why such an order was not passed on 20.4.1987. Admittedly there has been inordinate delay for which no reason or explanation has been furnished by the Respondents and the petitioner has superannuated on 31.7.1996.

21. In view of the above discussion the impugned order dated 29.6.1996 (Annexure "11") issued by the Director, Social Welfare, Bihar, Patna, Respondent No. 3 in purported exercise of the powers under Rule 97 of the Bihar Service Code is illegal and cannot be sustained. The Competent Authority is directed to pay the entire difference of salary and other allowances admissible to the Petitioner and treat the period of suspension as the period spent on duty by the Petitioner notwithstanding the impugned order dated 29.6.1996 (Annexure 11) as expeditiously as possible but not later than four months from the date of receipt of a certified copy of this Judgment by the Director, Social Welfare, Bihar, Patna, Respondent No. 3.

22. In the result the Writ Petition is allowed and the impugned order dated 29.6.1996 (Annexure "11") is quashed. No order as to costs.