

(2010) 05 PAT CK 0087

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 11793 of 2006

Sri. Pandey Gajendra Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 21-05-2010

Acts Referred:

Constitution of India, 1950 — Article 235

Criminal Procedure Code, 1973 (CrPC) — Section 437(1)

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 17, 18, 22

Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2010) 05 PAT CK 0087

Hon'ble Judges : Navin Sinha, J;Dinesh Kumar Singh, J

Bench : Division Bench

Advocate : Rajendra Prasad Singh and Mr. Rajeev Kumar Singh, for the Appellant; Ritesh Kumar, A.C. to A.A.G. I, Mr. Jitendra Singh Mr. Tej Pratap Singh and Mr. Kamal Kishore Singh, for the Respondent

Final Decision : Allowed

Judgement

Navin Sinha and Dinesh Kumar Singh, JJ.—Heard learned counsel for the petitioner, for the High Court and for the State of Bihar. The petitioner, at the relevant time held the post of Additional Munsif was placed under suspension and departmental proceedings were initiated. He has ultimately been dismissed from service on the recommendation of the High Court by order dated 19.06.2006 as communicated to him on 24.06.2006.

2. On 31.07.2002 memo of four charges were served upon him. In the departmental proceedings he has been exonerated of charge one and four. We therefore need not take notice of the same.

3. Charge 2 was that he granted bail in a case under Narcotic Drugs and Psychotropic Substance Act, 1985 (hereinafter called as N.D.P.S. Act) as a Judicial Magistrate (at that point of time). He had no jurisdiction to do so raising the presumption of extraneous consideration and which was an act tantamount

to judicial indiscipline, improper exercise of (judicial discretion unbecoming a conduct of a Judicial Officer amounting to gross misconduct. Charge No. 3 was that he granted bail to a lady after withdrawal of her anticipatory bail before this Court though she surrendered beyond time granted and was an accused in several cases indicating that bail was granted for consideration other than judicial tantamount to judicial indiscipline, improper exercise of judicial discretion and unbecoming of a conduct of a judicial officer which was a gross misconduct.

4. The petitioner filed his reply and denied the charges.

5. Learned counsel for the petitioner contended that Barauni Rail P.S. Case No. 64 of 1999 was registered u/s 47(A) of the Excise Act and not under N.D.P.S. Act for what was allegedly "ganja like substance" in six packets. The petitioner granted bail to one accused therein on 26.11.1999. Naturally he proceeded to grant bail to another accused on that basis on 16.12.1999. Final form under the N.D.P.S. Act was submitted only on 08.02.2000. Prior to that, a petition had been filed by the police on 04.12.1999 to convert the case into one under Sections 17, 18, 22 of the N.D.P.S. Act neither signed by the A.P.P. or filed by the A.P.P. None for the prosecution pressed that application. The petitioner therefore acted on basis of the records as it stood rather than on assumptions and presumptions as a judicial officer dealing with the liberty of a citizen.

6. Likewise he granted bail to a lady in Barauni Rail P.S. Case No. 76 of 1998 in exercise of judicial discretion u/s 437(1) proviso of the Code of Criminal Procedure after about a fortnight of custody.

7. Learned counsel for the respondents urged that no sooner that an application had been filed on 04.12.1999 to add provisions of N.D.P.S. Act in Barauni Rail P.S. Case No. 64 of 1999 in addition to Section 47(A) of Excise Act, petitioner should have been more prudent in not dealing with the matter any further. He did not reject the petition filed by the police on 04.12.1999 for adding N.D.P.S. Act and therefore whether it was signed or not by the A.P.P. or not moved by the A.P.P. is an irrelevant issue. The petitioner should have been more cautious in exercise of his judicial duties. On charge No. 3, it was urged that he granted bail by according different treatment on account of the fact that other co accused had been granted regular bail after approximately seven months of the custody. Therefore, there had been improper exercise of judicial discretion by the petitioner in both the cases and the order of dismissal therefore warranted no interference.

8. The petitioner was appointed in judicial service on 29.03.1986 in the 19th Batch when he joined as a Judicial Magistrate, Second Class. Before we proceeded to adjudicate the present matter, we also considered it prudent to call for the service record of the petitioner to satisfy ourselves in all aspects of the matter with regard to the officer concerned.

9. The grant or refusal of bail involves primarily the exercise of discretion by a judicial officer. This discretion is not absolute but is hedged by the words

"Judicial". In other words, such discretion has to be exercised in accordance with the provisions of the Code of Criminal Procedure or other penal laws as may be applicable keeping in mind aspects of jurisdiction apart from other criteria evolved judicial like nature of offence, likely punishment that may follow, social impact, antecedent etc. There can, therefore be no uniform and rigid standards for exercise of judicial discretion in bail matters which shall necessarily depend on the facts and circumstances of a particular case.

10. The legal system in our country functions in a structure of judicial hierarchy of courts. An order passed by a subordinate Court is subject to correction by the superior Court. Therefore bonafide but incorrect exercise of discretion shall not be sufficient to warrant disciplinary action in itself. However in a particular case, it shall always remain open as a matter of fact whether the order was in consonance with the record as it stood, a bonafide error in application of law and the exercise of judicial discretion or whether it was a deliberate mistake committed in the garb of a bona fide error of law designed and calculated to benefit the accused. At times the recitals in the order itself may also be sufficient who enable the superior Court to reach its own conclusion.

11. The exercise of judicial discretion necessarily carries with it the risk of bona fide errors. If a bona fide error without materials suggesting to the contrary, on assumptions and presumptions is given the garb or camouflage of an improper exercise of discretion for extraneous reasons, unless the circumstances be compelling, exercise of judicial discretion may itself become fraught with danger. The result will be a complete refrain from exercise of judicial discretion, to remain in the realm of a safe zone when not only justice shall be a causality but the burden of the superior Court shall unwarrantedly increase.

12. We are conscious of our jurisdiction in judicial review of an order of punishment passed in departmental proceeding. But since it concerns a judicial officer and the facts of the case has a vital bearing on the aspect of dispensation of justice, we consider it proper to examine the matter on all its aspects to satisfy our judicial conscience as ultimately it is the judiciary as a institution which is our concern.

13. Admittedly Barauni Rail P.S. Case No. 64 of 1999 was registered u/s 47(A) of the Excise Act for what is alleged "ganja like substance" in seven packets. It was not a case registered under the N.D.P.S. Act. If the police was so sanguine, it was for it to act in accordance with law by instituting a case under the appropriate provisions of law. If the prosecutor was itself unsure of the nature of the case it had lodged, can a judicial officer be straightaway faulted in exercise of his discretion. Undoubtedly the investigating officer had filed an application on 04.12.1999 to add Sections 17, 18, 22 of the N.D.P.S. Act which the petitioner had directed to be kept on record. In a criminal trial various kinds of petitions are filed which are kept on record. Some are pressed, order passed, others simply remain on record and are never pressed. If the prosecution was so sanguine for the need to prosecute under the N.D.P.S. Act, it was for the Assistant Public

Prosecutor to take steps in accordance with law by pressing that application. The petitioner as a Judge was not expected to become the prosecutor also as that was not his role. If no one pressed that application, he was under no compulsion to suo-motu treat it as a case under N.D.P.S. Act to deny liberty of the citizen. The aspect of the petitioner was dealing with the liberty of the citizen in custody based on prosecution materials laid before him when he exercised his judicial discretion, is a matter which has a foremost bearing in our mind. To us, it is primarily for the prosecution to answer that if the F.I.R. was lodged on 02.11.1999, why was it so lax in a matter as serious under the N.D.P.S. Act and why it acted so casually and took as long as 08.02.2000 to submit final form under N.D.P.S. Act. The departmental enquiry report proceeds on a wrong presumption at paragraph 22 that in the facts the petitioner granted bail without having jurisdiction to do so as a Magistrate under the N.D.P.S. Act. If he granted bail on 16.12.1999 and the N.D.P.S. Act came to be added on 08.02.2000, can it be simply logically concluded that it was a deliberate mistake in exercise of judicial discretion unbecoming of a judicial officer based on the records as they stood on the date when he was considering liberty of the citizen.

14. Paragraph 22 of the report itself states that his error lay in not keeping in mind that a petition was pending for conversion to the N.D.P.S. Act to conclude that he committed a grave error in law by granting bail in a case of allegation of recovery of ganja and a case under the N.D.P.S. Act. It has to be kept in mind that even in the original allegation it was "ganja like substance" and not that it was ganja.

15. In so far as charge No. 3 is concerned, we have absolutely no hesitation in holding that the petitioner acted in terms of his statutory powers u/s 437(1) proviso Cr. P.C. which makes an exception in favour of women. The woman accused was granted bail after 15 days of custody. She was not named and there was no recovery from her in an allegation of luggage lifting on the platform. If the male co accused had been granted bail after seven months of custody, the distinction to us being too apparent, can it be said that the exercise of discretion to grant bail to a woman in exercise of powers under the Code of Criminal Procedure amounted to conduct unbecoming of a judicial officer and a gross misconduct only because she had surrendered beyond time observed by the High Court.

16. We find it difficult to arrive at such a conclusion that by grant of such bail, he acted for extraneous consideration. We have examined the judicial records of the officer. In a case of grant of bail for extraneous consideration, there may not be direct and tangible evidence available, therefore impressions have to be gathered from the surrounding circumstances. We find it difficult to arrive at any such conclusion against the petitioner. However, in order to fortify our thinking, we also proceed to examine his annual confidential report more particularly with regard to the column for judicial reputation for honesty and integrity. The consistent remarks are that "his reputation is good", "yes", "judicial reputation

good", "yes".

17. The exercise of judicial or quasi judicial powers to decide a lis, is an exercise of great care and caution. Dissatisfaction may be writ large. Exercise of disciplinary control over acts done in discharge of such duties therefore has to be adjudicated on a different plane than mere service jurisprudence. Exercise of discretion in bail matters is all the more vulnerable. A bail granted and consequent departmental proceeding recently fell for consideration in Ramesh Chander Singh Vs. High Court of Allahabad and Another,

18. A police case was registered under Sections 302, 307 and 34 of the penal code. Two accused were granted bail while the third was granted bail on the fourth occasion after he surrendered before the Chief Judicial Magistrate and had remained in custody for more than one year on consideration that co accused had been granted bail, that he was a local resident, his chances of absconding were bleak, he had no criminal history etc apart from other factors. Allegations came to be made for acceptance of illegal gratification for grant of bail. A Prima facie view was taken of dereliction in duty and judicial dishonesty in granting bail. Departmental proceedings were initiated. There was no specific charge of having obtained illegal gratification for granting bail. The chargesheet only alleged that bail was granted for extraneous consideration on insufficient ground and he was guilty of misconduct by failing to maintain absolute integrity and devotion to duty. The charges bear a marked similarity with the present case. The officer came to be indicted and punishment awarded by the High Court. The Supreme Court at paragraph 8 of the judgment in the relevant extract noticed as follows:-

The question for consideration is whether the appellant had granted bail on insufficient grounds or was justified in passing such an order. Granting of bail to the accused pending trial is one of the significant judicial functions to be performed by a judicial officer. In the instant case, neither the State nor the complainant had filed any appeal against the order passed by the appellant. The State did not allege that the accused who had been granted bail was likely to abuse his bail or likely to abscond. It is also pertinent to note that the accused to whom the appellant had granted bail was one of the three accused against whom charge-sheet had been filed by the police. The other two accused were Rajendra and Raghunath. As per the first information report, Ram Pal, to whom the appellant had granted bail, and Raghunath, who obtained bail from the High Court, had used firearms as a result of which two persons died. As per the prosecution case, the accused Ram Pal is alleged to have caused the death of one of the victims while accused Raghunath was alleged to have caused the death of the other victim. Accused Raghunath was granted bail by the High Court on 20-9-1995. Accused Rajendra was granted bail as early as on 19-8-1995. Accused Ram Pal had been in custody for more than one year. The police had already filed the charge-sheet against him and the court was yet to frame the charge against all the accused. Accused Ram Pal was a student and he alleged

that he had suffered a loss of one year's study. He also alleged that his father was seriously ill due to a heart ailment and he produced a medical certificate from one of the professors working in the local medical college. It was under these circumstances that the bail application filed by Ram Pal came to be heard by the appellant and he granted bail to him by an order passed on 22-6-1996. It is also important that the complainant made an attempt to have the bail application transferred from the court of the appellant to the Principal Sessions Court. Though he filed the application for transfer, he did not press for stay of the proceedings. The appellant officer came to know about the filing of the transfer application and brought this fact to the notice of the counsel who appeared for the complainant and also the State Prosecutor. Both the counsel had no objection to the hearing of the bail application by the appellant and accordingly, the appellant heard the bail application and passed the order granting bail to Ram Pal. It is clear that by filing a frivolous transfer application the complainant only intended to create a sense of threat so as to influence the appellant not to grant bail to the accused. The filing of the transfer application by the complainant could not be viewed from any other angle. Despite this, the complainant did not file any application for cancellation of bail granted to the accused.

19. Considering the stand of the respondent as noticed in paragraph 10, the Supreme Court concluded at paragraph 11 and 12 as follows.

10. The counsel for the respondent pointed out that on three previous occasions the bail had been declined to the very same accused and as there was no change in the circumstances, the appellant officer should not have considered the fourth bail application as well. Of course, in the previous bail applications, many of the contentions raised by the accused were considered, but an accused has the right to file bail application at any stage when undergoing imprisonment as an undertrial prisoner. The fact that the two other accused had already been enlarged on bail was a valid reason for granting bail to accused Ram Pal. Moreover, accused Ram Pal had been in jail for one year as an undertrial prisoner and the charge-sheet had already been filed. In our opinion, if accused Ram Pal were to be denied bail in these circumstances, it would have been a travesty of justice especially when all factors relevant to be gone into for considering the bail application were heavily loaded in favour of grant of bail to accused Ram Pal.

11. We fail to understand as to how the High Court arrived at a decision to initiate disciplinary proceedings solely based on the complaint, the contents of which were not believed to be true by the High Court. If the High Court were to initiate disciplinary proceedings based on a judicial order, there should have been strong grounds to suspect officer's bona fides and the order itself should have been actuated by malice, bias or illegality. The appellant officer was well within his right to grant bail to the accused in discharge of his judicial functions. Unlike provisions for granting bail in the TADA Act or the NDPS Act, there was no statutory bar in granting bail to the accused in this case. A sessions Judge was competent to grant bail and if any disciplinary proceedings are initiated against

the officer for passing such an order, it would adversely affect the morale of subordinate judiciary and no officer would be able to exercise this power freely and independently.

12. This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, the High Court must take extra care and caution.

20. It then dealt with its own order in more than one case with regard to judicial officers at paragraph 13 to 17 and finally concluded at paragraph 18, all of which read as follows.

13. In *Ishwar Chand Jain v. High Court of P & H* this Court observed that while exercising control over subordinate judiciary under Article 235 of the Constitution, the High Court is under a constitutional obligation to guide and protect subordinate judicial officers. An honest and strict judicial officer is likely to have adversaries. If complaints are entertained in trifling matters and if the High Court encourages anonymous complaints, no judicial officer would feel secure and it would be difficult for him to discharge his duties in an honest and independent manner. It is imperative that the High Court should take steps to protect honest judicial officers by ignoring ill conceived or motivated complaints made by unscrupulous lawyers and litigants.

14. In *K.P. Tiwari v. State of M.P.* where the High Court reversed the order passed by the lower court making remarks about interestedness and motive of the Lower Court in passing the unmerited order, this Court observed that one of the functions of the higher court is either to modify or set aside erroneous orders passed by the lower courts. Our legal system acknowledges fallibility of judges. It has to be kept in mind that a subordinate judicial officer works mostly in a changed atmosphere. He is under a psychological pressure-contestants and lawyers breathing down his neck. He does not enjoy the detached atmosphere of the higher court. Every error, however gross it may be, should not be attributed to improper motives. The judges of the High Court have a responsibility to ensure judicial discipline and respect for the judiciary from all concerned. No greater damage can be done to the administration of justice and to the confidence of the people in the judiciary if the higher courts express lack of faith in the subordinate judiciary for some reason or the other. That amounts to destruction of judiciary from within.

15. In *Kashi Nath Roy v. State of Bihar* this Court observed under a similar circumstance that in our system appellate and revisional courts have been set up with the presupposition that the lower courts in some measure of cases can go wrong in decision-making in law and in fact. The higher courts have been

established to correct errors. In cases where intolerable error is pointed out, it is functionally required to correct the error in an appropriate case and in a manner befitting maintaining dignity of the court and independence of the judiciary. The higher court should convey its message in the judgment to the officer concerned through a process of reasoning, essentially persuasive, reasonable, mellowed but clear and result oriented and rarely a rebuke.

16. In a series of other cases also, this Court disfavoured the practice of passing strictures or others against the subordinate officers. (See *Braj Kishore Thakur v. Union of India*, *Alok Kumar Roy v. Dr. S.N. Sarma*).

17. In *Zunjarrao Bhikaji Nagarkar v. Union of India* this Court held that wrong exercise of jurisdiction by a quasi-judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the judicial officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Article 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grass-root level.

18. Apart from the merits of the case before us, we have also gone into the confidential reports of the appellant officer. His integrity and honesty had never been doubted at any point of time. In some of the confidential reports except stating that the appellant officer was not having smooth relationship with the advocates, no other adverse remarks had been entered. Two senior Judges of the High Court have entered in his confidential register that the appellant is an officer of honesty and integrity. The fact that it was a case of daylight murder wherein two persons died, is not adequate to hold that the accused were not entitled to bail at all. Passing order on a bail application is a matter of discretion which is exercised by a judicial officer with utmost responsibility. When a co-accused had been granted bail by the High Court, the appellant can not be said to have passed an unjustified order granting bail, that too, to an accused who was a student and had been in jail for more than one year. If at all, the inspecting Judge had found anything wrong with the order, he should have sent for the officer and advised him to be careful in future. The punishment of reverting the appellant to the post of Civil Judge (Senior Division), in the facts and circumstances of this case could only be termed as draconian and unjust. The appellant had been in the cadre of District Judge for eight years at the time this grave punishment of reversion to a lower rank was imposed on him. In our

opinion, the punishment was clearly disproportionate to the lapse alleged to have been committed by him. The imposition of the punishment of withholding two increments with cumulative effect also appears to be disproportionate to the alleged lapse

(emphasis ours)

21. The punishment of reversion was held to be draconian and unjust. The present punishment of dismissal obviously is far more onerous.

22. It has been submitted that during the pendency of the writ petition, the petitioner has reached the age of superannuation whether it be considered as 58 years when there would have been reappraisal or the age of 60 years the maximum age till which he may have continued. The question of reinstatement therefore does not arise.

23. We are therefore satisfied for reasons discussed by us that the punishment of dismissal dated 19.6.2006 is not sustainable. The communication dated 24.6.2006 stands automatically vitiated. Both the orders are accordingly quashed.

24. We deem it proper to grant him 40% of the back wages as compensation. So far as the remaining 60% back wages is concerned, we grant liberty to the petitioner to represent to the High Court. It is expected that the High Court shall hold an enquiry of his status in the interregnum and then take an appropriate decision in accordance with law on his claim for the balance back wages. Needless to state that he shall now be entitled to fixation of his pension and other retiral dues in accordance with law pursuant to the dismissal order having been set aside, expeditiously. The application stands allowed. No order as to costs.