
(2016) 10 PAT CK 0051

In the Patna High Court

Case No : Letters Patent Appeal No. 546 of 2015, Arising out of Civil Writ Jurisdiction Case No. 7631 of 2013

The Bihar State Co-operative Marketing Union Limited

APPELLANT

Vs

Suresh Chandra Sharma

RESPONDENT

Date of Decision : 20-10-2016

Acts Referred:

Citation : (2017) 1 PLJR 772

Hon'ble Judges : Mr. Hemant Gupta and Mr. Ahsanuddin Amanullah, JJ.

Bench : Division Bench

Advocate : Mr. Y.V. Giri, Sr. Advocate with M/s. Ishwari Singh and Rajendra Prasad, Advocates, for the Appellants; Mr. Ram Suresh Roy, Sr. Advocate with M/ S. Binod Kumar Singh and Gaurav Kumar, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Hemant Gupta, J. (Oral) - The challenge in the present Letters Patent Appeal is to an order dated 3rd July, 2014, passed in C.W.J.C. No. 7631 of 2013 by the learned single Judge whereby the order of punishment, dated 09.05.2005 (Annexure-16) and the order, dated 19.10.2012 (Annexure "C") was quashed and the appellants herein were directed to settle the claim of the writ petitioner as if any liability does not stand against him.

2. The said orders came to be passed after a long drawn litigation. The writ applicant was appointed as Sales Man-cum-Account Assistant in the year 1974. He was later promoted to the post of Assistant Depot Manager. On 14th April, 1988, a first information report, for the offence under Sections 403, 409 and 465 of the Indian Penal Code, was registered alleging misappropriation of fertilizer worth Rs. 2,69,250/-. An order of dismissal was passed by the Administrator on 11.04.1989 on account of allegation of misappropriation of fertilizers, seeds and medicine worth Rs.2,71,925.94 after the enquiry officer found the writ applicant guilty.

3. A writ, being C.W.J.C. No. 5957 of 1991 filed before this Court against the order of dismissal which was accepted on 30.08.1991. It is thereafter, the petitioner-respondent was reinstated vide order, dated 04.11.1996. The writ applicant was, again, suspended on 26th December, 1996, in contemplation of departmental proceeding. The writ applicant challenged the suspension in C.W.J.C. No. 11938 of 1996. In an interlocutory application (I.A. No. 2869 of 2014) in the said writ application, it was ordered on 5.2.1998 by this Court that the departmental proceeding be concluded within four months failing which the suspension shall stand revoked. It is thereafter, the suspension of the writ applicant was revoked from 05.06.1998.

4. The writ applicant filed another writ application, being C.W.J.C. No. 7004 of 2003 for payment of arrears of salary and other allowances in respect of suspension period. The said writ application was disposed off on 28th July, 2003, with the direction to decide the representation of the writ applicant. The writ applicant filed a contempt petition as well which was dismissed on 11th May, 2005, where it was stated that the dues, due to the writ applicant, shall be paid with the salary of other employees of Bihar State Co-operative Marketing Union Limited. It is thereafter, an order was passed on 9th May, 2005, to recover a sum of Rs. 2,71,925.94. The present writ application was filed on 10.04.2013. The writ applicant claimed the following reliefs :

(a) For set-aside the order, passed by the Managing Director, Bihar State Co-operative Marketing Union Limited, Patna, vide order no. B/194 dated 09.05.2005. The said order is annexed herein as Annexure-17.

(b) For payment of salary since 1986-87. The said medical leave certificate is annexed here as Annexure-10.

(c) For issuance of TDS Certificate and Form 16 to the petitioner. The said representation is annexed here in as Annexure-22.

(d) For fixation of salary during suspension period of the petitioner.

(e) For payment of the gratuity, leave encashment, Provident Fund and retrial benefits to petitioner after retirement.

5. Subsequently, Annexure "C", dated 19th October, 2012, was produced by the Bihar State Co-operative Marketing Union Limited in its counter affidavit wherein another sum of Rs.2,66,569.37 was ordered to be recovered from the writ applicant. It is the order Annexure-16, dated 09.05.2005, and order, dated 19th October, 2012, Annexure "C" which has been set aside by the learned single Bench. An affidavit was filed on behalf of the appellant that the writ applicant is responsible for vanishing of the files and has manipulated things to his advantage. The learned Single Bench allowed the writ application inter alia on the ground that the Appellant has not produced the proceeding of the departmental enquiry which culminated into passing of the impugned orders; and that the order of punishment has been passed without conducting any enquiry.

6. The Court found that the orders (Annexure-16 and "C") have been passed without following the procedure whatsoever and when the writ applicant has come clean in criminal proceeding and the order of dismissal stands set aside by this Court.

7. Before this Court, learned counsel for the appellant has raised an argument that writ application before this Court under Article 226 of the Constitution of India is not maintainable to challenge the orders, dated 09.05.2005 and 12.10.2012, in view of the order of the Special Bench of five Judges, reported in 2014 (1) P.L.J.R., 695 (The Organizer, Dehri C.D. & C.M. Union Limited v. The State of Bihar & Ors.) wherein, it has been held that BISCOMAUN is not a State amenable to the writ jurisdiction of this Court. It is contended that the impugned orders have since been set aside by the learned single Judge passed on 09.05.2005 and 12.10.2012 and at that time, the affairs of Bihar State Co-operative Marketing Union Limited (for short the BISCOMAUN) was managed by the elected body and that the order has not been passed by an Administrator. Thus, the writ application was not maintainable before this Court in view of the Special Bench's judgment of this Court. To support the assertion such orders were not passed by the Administrator and to prove the period when Administrator was managing the affairs of BISCOMAUN or when the elected body was under suspension, the Appellant filed a supplementary affidavit dated 22nd July, 2016. There is no counter affidavit filed to such affidavit on behalf of the writ applicant.

8. The five Judges Special Bench in The Organizer, Dehri C.D. & C.M. Union Limited has, inter alia, returned the following findings in respect of the fact that a writ application against BISCOMAUN is not maintainable. The relevant findings read as under :

"52. Here I may refer to a Division Bench judgment of this Court in the case of Harendra Narain Banker v. The State of Bihar, since reported in 1985 P.L.J.R., 1078. The question was whether Bihar State Cooperative Marketing Union Limited (BISCOMAUN) is an instrumentality or agency of the State and consequently amenable to writ jurisdiction. Court analysed the provisions and the constitution of BISCOMAUN. It held that even though almost 99% of the share holding was of the State Government, its Managing Director being appointed by the Government being a Government employee, its Apex Managing Committee and its Chairman all elected by other Co-operatives, as such in the Apex Managing Committee, the Government had hardly any say. It was not performing any public duty or public function for an on behalf of the Government. Thus, the cumulative effect was no deep and pervasive control nor public duty or public function and as such it was not "State" or State instrumentality or agency and writ petition was not maintainable. In view of the judgments of the Apex Court as noticed above, the view taken by this Court in that case cannot be doubted.

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67. That being so, I would answer the reference in the following terms :-

(i) Even though the nature of a private Co-operative, which is otherwise not State within meaning of Article 12 of the Constitution, it does not change by appointment of a Special Officer or an Administrator making Co-operative a "State" within the meaning of Article 12, but the very fact of appointment of Special Officer or Administrator in terms of Sections 4(1), 41(2), 41(3) or Section 41(5) makes the Special Officer/Administrator an "authority" under Article 12 of the Constitution, thus, amenable to writ jurisdiction and his action has to be consistent with Part-III Rights of the Constitution being a statutory authority. If such officer is a Government servant then he is "State" per se.

The Division Bench judgment of this in case of Nand Kishore Rai (supra) and the Full Bench judgment of this Court in case of Rajenmdra Prasad Sah (supra) are correct and do not require reconsideration."

9. However, the Special Bench makes an exception to hold that the writ application would be maintainable when the Administrator is appointed by the Government even if he does not happen to be a State employee. Such findings are recorded in paragraphs 56 and 57, which reads as follows :

"56. There is no gainsaying that whenever a Government Officer is appointed as an Administrator or a Special Officer replacing the Managing Committee by nature of the person being Government officer, he does not cease to be so when acting in such capacity. He continues to be a Government servant and, thus, "State" directly being part of executing State within the meaning of Article 12 of the Constitution.

57. In any view, the situation will not change even if the Administrator so appointed is not a Government servant for he is still appointed by State acting through the Registrar, Co-operative Societies and is to work directly under his control and superintendence under Section 41(7) and as such he becomes a "statutory authority" himself."

10. Learned counsel for respondent-writ applicant vehemently argued that the order of punishment was passed when the Administrator was appointed and that the writ applicant is seeking consequences benefits of the dismissal order being set aside, therefore, the writ application would be maintainable. He relies upon the findings relied in the Special Bench in The Organizer, Dehri C.D. & C.M. Union Limited (Supra) as well.

11. We have heard the learned counsel for the parties and find that the claim of the writ applicant in the writ application was to set aside the order, dated 09.05.2005, and by virtue of I.A. No. 2869 of 2014, the order Annexure "C", dated 19.10.2012. The question is whether challenge to such orders could be made in the writ application under Article 226 of the Constitution of India. We find that two dates would be relevant to determine whether writ application would be maintainable against the BISCOMAUN. Firstly the date on which the

impugned order is passed and/or Secondly the date when the writ application is filed.

12. It was the elected Board of Directors which was managing the affairs of BISCOMAUN on 09.05.2005 when first impugned order was passed. The order, dated 10.12.2012, was passed when an Administrator was managing the affairs of the BISCOMAUN, but, the order was passed by the Managing Director. The new Board of Directors was elected on 23rd November, 2012. It is the Board of Directors which was in place when the writ application was filed before this Court.

13. In view of the judgment of the Special Bench of this Court, the writ application would not be maintainable against the order, dated 09.05.2005, as such order was passed by the Managing Director of BISCOMAUN and when the elected Board of Directors of BISCOMAUN was managing its affairs. However, in respect of the order, Annexure "C", the elected Board of Directors was superseded on 10.10.2011 and the new Board of Directors was elected on 23rd November, 2012, but, the order of recovery was passed by the Managing Director of BISCOMAUN. The judgment of the Special Bench deals with the situation when the impugned order is passed by the Administrator whose appointment will make such authority as amenable to the writ jurisdiction of this Court, but, when the order is passed by the Managing Director of BISCOMAUN, such order would not be by statutory authority to be amenable to the writ jurisdiction. In any case, on the date of filing of the writ application on 10.04.2013, the elected Board of Directors was managing the affairs of BISCOMAUN. Therefore, in terms of the decision of Special Bench, no writ petition would be maintainable against BISCOMAUN. Thus, in either situation, the writ application would not be maintainable before this Court in view of the judgment of the Special Bench, consequently the order passed by the learned single Judge is set aside.

14. However, it shall be open to the writ applicant to avail such other remedy as is available in accordance with law.