

(2014) 08 PAT CK 0029
In the Patna High Court
Case No : LPA No. 466 of 2012

The State of Bihar

APPELLANT

Vs

Alimuddin

RESPONDENT

Date of Decision : 12-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Constitution of India, 1950 — Article 226

Citation : (2014) LabIC 3896

Hon'ble Judges : Rekha M. Doshit, C.J.; Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Piyush Lall, Advocate for the Appellant; Rajendra Nath Jha and Navjot Yeshu, Advocate for the Respondent

Judgement

Rekha M. Doshit, C.J.

1. This Appeal under Clause 10 of the Letters Patent is preferred by the respondent-State of Bihar against the judgment and order dated 20th October 2011 passed by the learned single Judge in CWJC No. 9663 of 2010. Feeling aggrieved by the order of punishment dated 9th April, 2010 made by the State Government, the respondent-writ petitioner, a cashier in the office of the Executive Engineer, Design Division, Water Resources Department, Birpur, District-Supaul, filed above CWJC No. 9663 of 2010 under Article 226 of the Constitution. Under the aforesaid order dated 9th April, 2010, the petitioner has been, in exercise of power conferred by Rule 43(b) of the Bihar Pension Rules, 1950, visited with punishment of withholding of the entire pension and direction has been issued to recover the amount of monetary loss suffered by State Government as under:--

2. In view of uncertainty about the date of superannuation of the petitioner, the aforesaid order dated 9th April, 2010 was modified under order dated 13th May 2010. The said modified order reads as under:--

3. Not only the petitioner has been punished for the proved misconduct, order has been made to initiate departmental proceeding for misrepresentation in respect of his date of superannuation.

4. The petitioner challenged the above referred order of punishment on the ground of disparity alone. According to the petitioner, the entire incidence of misappropriation of Government fund was noticed by the auditors. The auditors had opined that not only the petitioner but many others were involved in the said incidence of misappropriation. According to the petitioner, the petitioner was singled out in imposing punishment upon him whereas the others, the Engineers who were themselves drawing and disbursing authorities, were allowed to go scot-free. Neither the disciplinary proceeding was initiated against them; nor they were punished.

5. The petition was contested by the State Government. The learned single Judge has allowed the writ petition on the ground of disparity. The learned single Judge has observed that although along with the petitioner two others were named in the charge-sheet, no disciplinary proceeding was initiated against the said two persons. The learned single Judge has also observed that if several persons had connived in misappropriation of the Government fund, the entire amount cannot be allowed to be recovered from the writ petitioner. In view of the aforesaid finding, the learned single Judge has set aside the order of punishment. Therefore, this Appeal.

6. In course of the hearing, under order dated 1st July, 2014, we had directed the appellant State Government to produce the entire record of the disciplinary proceedings. In compliance of the said order, the original records were brought before the court and a supplementary affidavit has been filed to produce on record all relevant documents before the Court.

7. Learned advocate Mr. Navjot Yesu has raised an objection. He has submitted that pending the Appeal, the State Government is debarred from producing fresh materials on the record. In support thereof, he has relied on our order dated 26th November, 2013 made in the matter of Binu Kumar (Letters Patent Appeal No. 1 of 2013 arising from CWJC No. 6336 of 2007).

8. In the said matter, we had made observation in respect of defence raised by the State Government that the State Government had " contested the writ petition and now the appeal under several counter affidavits and has tried to improve the impugned order of termination of service under the said affidavits. The approach of the State Government is contrary to the cardinal principle that an order has to be read as it is and cannot be improved by affidavits.

9. Mr. Navjot Yesu has submitted that the aforesaid principle should apply in the present case also. The State cannot be permitted to support the impugned order of punishment by the materials which were not brought on the record of the writ petition.

10. It is apparent that Mr. Navjot Yesu has failed to understand the intricacies of the law involved in the matter of Binu Kumar and in the matter on hand. This is not the case where the State has improved upon the order of punishment by filing affidavit in support of the order of punishment. It was this Court which had directed the State Government to produce the record of the disciplinary proceeding in exercise of power conferred by Order XLI, Rule 27, C.P.C. Clause (b) of sub-rule (1) of Rule 27 of Order XLI empowers the appellate Court, inter alia, to direct production of any document to enable the Court to pronounce judgment or for any substantial cause. In view of the aforesaid specific provision made under Order XLI, Rule 27, C.P.C. the objection raised by Mr. Navjot Yesu is rejected.

11. The matter relates to the defalcation or embezzlement of the Government fund by the appellant, the cashier and some others during the period from 1991 to 1997. The incidence came to light only after the audit report was submitted on 26th June, 1998. The withdrawals made by the Executive Engineer, Design Division, Kosi Project, Birpur during November, 1991 to November, 1997 were the subject matter of scrutiny by the auditors. According to the auditors, a sum of Rs. 55.97 lakh was fraudulently withdrawn from the Treasury by presenting forged bills and the amounts so withdrawn were not accounted for. For the said incidence of misappropriation of Government funds, the auditors held seven persons responsible, six Executive Engineers who were posted as such at some time during the period from June 1988 till the date of report and the writ petitioner, who was the Cashier during the entire period. Pursuant to the said report, a disciplinary action was initiated against the petitioner. A criminal case was also instituted against the petitioner. At the relevant time, the petitioner was absconding and did not participate in the disciplinary proceeding. The disciplinary proceeding was, thus, remained unopposed. After due enquiry, under order dated 9th August, 2000 made by the State Government, the petitioner was dismissed from service. The said order was challenged by the petitioner in CWJC No. 7078 of 2001. The said petition was allowed by the learned single Judge of this Court on the premise that the order of punishment was made in violation of the principles of natural justice. Pursuant to the direction issued by the learned single Judge, the disciplinary proceeding was held against the petitioner de novo. In the meantime, the petitioner having reached the age of superannuation, the departmental enquiry was proceeded against him under Rule 43(b) of the Bihar Pension Rules, 1950. After the aforesaid enquiry, under order dated 9th April, 2010, the petitioner was visited with punishment of withholding of the entire pension. It was directed that a sum of Rs. 55.97 lakhs illegally recovered by the petitioner be recovered from the terminal dues of the petitioner and the remaining amount be recovered by filing a money suit. However, the petitioner having reached the age of superannuation, the said order dated 9th April, 2010 was modified under order dated 13th May 2010.

12. We may note here that the petitioner has not challenged the disciplinary proceeding conducted against him or the finding of guilt recorded against him.

The sole ground of challenge is the disparity in punishment or the discrimination.

13. Learned advocate Mr. Piyush Lall has appeared for the appellant-State of Bihar. Mr. Piyush Lall has submitted that the learned single Judge has committed a manifest error. He has submitted that the learned single Judge has proceeded on the belief that the two persons named in the charge-sheet issued against the petitioner were not proceeded against. He has submitted that the persons referred to by the learned single Judge were the enquiry officer and the presenting officer appointed for concluding the enquiry against the petitioner. The judgment having been solely based on the aforesaid observation by the learned single Judge, the matter calls for interference.

14. Mr. Piyush Lall has relied upon the supplementary affidavit and the supporting documents filed pursuant to our order dated 1st July 2014. He has submitted that it is not true that the petitioner has been meted a discriminatory treatment. Apart from the petitioner, one Executive Engineer, who was found guilty, has been dismissed from service. The disciplinary proceeding was initiated against other Engineers also, but for want of proof they were exonerated.

15. Learned advocate Mr. Navjot Yesu has appeared for the respondent-petitioner. He has contested the Appeal. He has vehemently submitted that the learned single Judge has considered the materials on record. The judgment of the learned single Judge, therefore, does not warrant interference. This Court will not rely upon or examine the additional materials brought on the record. He has submitted that the disparity is apparent. The disciplinary proceeding has been held against the petitioner who was a mere Cashier and the Engineers who were allegedly involved in the incidence, have been allowed to go scot-free. Not only that no disciplinary proceeding was held against them, they had been continued in service; had been promoted to the higher post; and are allowed to enjoy the pension and the other retiral benefits. The hostile discrimination meted to the petitioner calls for quashing of the order of punishment. In support of his submission, he has relied upon the judgments of the Hon"ble Supreme Court in the matters of Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, ; of Man Singh Vs. State of Haryana and Others, ; and of Union of India (UOI) and Others Vs. Manab Kumar Guha, .

16. In the matter of Bongaigaon Refinery and P.C. Ltd. and Others Vs. Girish Chandra Sarmah, , the delinquent was a Deputy General Manager in the Refinery. He was alleged to have acted dishonestly in selection of a particular piece of land for purchase on the ground of economic viability. For the said act of misconduct, he was visited with punishment of reduction in rank for five years. The challenge to me said order of punishment succeeded before the High Court. In me appeal before the Hon"ble Supreme Court preferred by Bongaigaon Refinery, the Hon"ble Court held that the determination of price of the land to be purchased was made by the Price Negotiation Committee of which the delinquent was one of the members. He alone could not have been held responsible. If a wrong were committed, the entire Negotiation Committee was responsible for me

same. The Hon'ble Court observed, "It is not the respondent alone who can be held responsible when the decision was taken by the committees (sic committee). If the decision of the committee stinks, it cannot be said that the respondent alone stinks; it will be arbitrary. If all fish stink, to pick one and say only it stinks is unfair in the matter of unanimous decision of the Committee."

17. This judgment is clearly distinguishable. The subject matter of enquiry was a singular incidence where more than one person had acted collectively.

18. In the matter of Man Singh Vs. State of Haryana and Others, , punishment of withholding of two increments was imposed upon the appellant, a Sub-Inspector in Haryana Police, for his failure to supervise the conduct of the driver of the vehicle in which he was travelling. The driver was alleged to be illegally transporting the liquor. Although no proceeding was held against the driver, the petitioner was punished as aforesaid for his failure to keep vigil on the driver. The Hon'ble Court intervened on the ground that the appellant was dealt with unfairly.

19. This judgment also is distinguishable. The incidence in question was one particular incidence where real wrong doer was the driver of the vehicle who had not been proceeded against and the superior officer was punished for alleged failure to keep vigil over the driver.

20. The judgment in the matter of State Bank of India and Others Vs. Bidyut Kumar Mitra and Others, does not support the contention raised by Mr. Navjot Yeshu.

21. In the present case, it is interesting to note that the entire process of defalcation or embezzlement was spread over long period of time from November, 1991 to November, 1997. All throughout, several persons were posted as Executive Engineer, some were for few months; some for three years. Every Executive Engineer who functioned at sometime during the said period may or may not have contributed to the aforesaid acts of misappropriation. The one person, who was consistently present on the scene all throughout the said period, was the Cashier, the writ petitioner. The petitioner being a Cashier directly handling the cash, his role cannot be of mean magnitude. The modus operandi adopted for misappropriation cannot be the handy work of a simple mind. The acts of large scale misappropriation committed over a long span of time could not have been missed by the Cashier, the writ petitioner. Had he not been involved, he would have reported the incidence to a superior officer. We are, therefore, not ready to believe the contention that the petitioner was a petty Cashier who had no role to play.

22. Further, as recorded hereinabove, neither the petitioner challenged the disciplinary proceeding; nor did he challenge the finding of guilt recorded against him. We are, therefore, not called upon to examine the legality of the disciplinary proceeding conducted against the petitioner; nor are we called upon to examine the correctness of finding of guilt recorded against the petitioner. In any view of

the matter, this Court exercising power of judicial review under Article 226 of the Constitution will not sit in appeal over the finding of guilt recorded by the disciplinary authority; nor will this Court re-appreciate the evidence to record its own finding.

23. The only question we are supposed to examine is whether the petitioner has been meted hostile discrimination which will vitiate the disciplinary proceeding and the order of punishment.

24. It is now brought on record that apart from the petitioner, one Executive Engineer was also found to be guilty and has been dismissed from service. In respect of other delinquents, there was no evidence of their complicity. This rules out the contention of hostile discrimination. Apart from this, we do not suppose we should overlook the misconduct of this magnitude proved against the petitioner on the principle of equality. If we find that the State Government has acted unfairly in proceeding against one of the delinquents, the right course of action would be to direct the State Government to hold proper enquiry in respect of the complicity of the others involved, but to overlook the proved misconduct of such gravity would amount to injustice to the society and the people at large.

25. The gravamen of the contention raised by Mr. Navjot Yesu that although it is proved that several persons were involved in the incidence, the entire monetary loss is sought to be recovered from the writ petitioner. We may note here that only punishment imposed upon the petitioner is that of withholding of the pension. The direction to file a money suit or to initiate enquiry for the incidence of misrepresentation by the petitioner in respect of his age of superannuation are in no manner a punishment envisaged by Rule 14 of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005. The petitioner will have a right to defend the money suit. We are, therefore, not impressed by the contention that the petitioner has been meted hostile discrimination.

26. The learned single Judge has considered the charge-sheet issued upon the petitioner. The learned single Judge has observed that in the charge memo dated 10th September, 2009 two persons named therein were also charge-sheeted, but the respondent-State did not answer the plea raised by the petitioner. A bare perusal of the charge-sheet will disclose that indeed the learned single Judge has erred in reading the charge-sheet. The two persons named therein Ram Prasad Ram, Chief Engineer and Lakshuman Ram, Technical Advisor, were appointed to be the enquiry officer and the presenting officer in the disciplinary proceeding proposed to be held against the petitioner. The question of not dealing with the contention in respect of the said Ram Prasad Ram and Lakshuman Ram did not arise.

27. At this stage, Mr. Navjot Yesu has submitted that the petitioner was not supplied copy of the report of the enquiry officer. Mr. Piyush Lall concedes that the report of the enquiry officer was not furnished to the petitioner. He has, however, submitted that in absence of any prejudice alleged by the petitioner

mere failure to furnish the report of the enquiry officer will not vitiate the enquiry or the order of punishment.

28. We agree with Mr. Piyush Lall. This is exactly what has been held by the Hon''ble Supreme Court in the matter of State Bank of India and Others Vs. Bidyut Kumar Mitra and Others, relied upon by Mr. Navjot Yesu. The Hon''ble Court has held that non-supply of a document should be raised at the earliest opportunity. Unless a prejudice is alleged and proved, non-supply of document will not vitiate the disciplinary proceeding. It is evident that the petitioner did not press the issue of non-supply of enquiry officer''s report before the learned single Judge; nor the petitioner has alleged any prejudice suffered by him on account of non-supply of the enquiry officer''s report. Before us also, Mr. Navjot Yesu has not demonstrated that any prejudice has been caused to the petitioner for the aforesaid lapse on the part of the disciplinary authority.

29. In our opinion, non supply of the report of the enquiry officer to the petitioner will not vitiate the punishment imposed upon him.

30. No other contention is raised before us.

31. Letters Patent Appeal is allowed. Impugned judgment and order dated 20th October 2011 passed by the learned single Judge in CWJC No. 9663 of 2010 is set aside. CWJC No. 9663 of 2010 is dismissed. The parties will bear their own cost. Interlocutory Application stands disposed of.