

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11482 of 2013

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Ram Dhyan Ram, son of Late Saryug Ram, resident of Sri Ram Kutir, 4H/4, Awas Board Colony, Post Office- Bahadurpur, P.S.- Agamkuan, District- Patna

.... Petitioner/s

Versus

1. The State of Bihar
2. The Secretary, Road Construction Department, Govt. of Bihar, Visheshwariya Bhawan, Bailey Road, Patna
3. The Deputy Secretary (Vigilance), Road Construction Department, Govt. of Bihar, Patna
4. The Accountant General (A&E), Birchand Patel Marg, Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjeev Kumar, Adv.

For the Respondent/s : Mr. Mr. Anil Kumar Sinha, GA-1

For the Accountant General : Mr. Uday Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 13-12-2016

Heard learned counsel for the petitioner and learned counsel for the State.

2. The petitioner has made two prayers in the present writ application. They are :-

(i) to issue a writ in the nature of certiorari for quashing the letter dated 21st May, 2013 whereby the petitioner has been asked to deposit a sum of Rs.9,70,392/-;

(ii) to issue a writ in the nature of mandamus commanding the respondents not to interfere with the pension payable to the petitioner and further directing the respondents not to take any coercive steps against the



petitioner.

3. The facts of the case are simple and brief. The petitioner retired from the post of Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary on 31st July, 2010 in the Road Construction Department. After retirement, his full pension has been sanctioned by the office of the Accountant General vide Pension Payment Order dated 25th August, 2010. Subsequently, the petitioner was given notice vide letter dated 14th March, 2013 issued under the signature of the Deputy Secretary (Vigilance), Road Construction Department, State of Bihar (Annexure-1) along with memo of charge in Prapatra (k) to show cause under Rule 139 of the Bihar Pension Rules, 1950 (for short 'Rules') why a sum of Rs.9,70,392/- may not be recovered from him for the charges that when he was posted as Superintending Engineer, Road Circle, Darbhanga, he gave extension of service period to Sri Sanjay Kumar Verma, Sri Babban Prasad Singh and Md. Parvej Akhtar Ansari, all illegally appointed Lower Division Clerks, initially for three months each and later on till further orders. The notice further stated that for the alleged misconduct the petitioner was found guilty and hence the payment made as salary to the tune of Rs.9,70,392/- to the aforesaid illegal appointees was recoverable from him and in that regard he was required to show cause within fifteen days from the date of receipt of



the notice. The petitioner replied to the show cause notice vide letter dated 26th March, 2013 (Annexure-2) in which he stated that he retired on 31st July, 2010 and thereafter finding his service to be thoroughly satisfactory his pension and other post retiral dues were sanctioned by the State and he was getting his full pension regularly since 1st August, 2010. He stated that he was posted as Superintending Engineer, Road Circle, Darbhanga from 17th June, 1995 to 11th February, 1997 and thus he remained on that post for a total period of one year seven months and twenty-four days only. The three clerks whose appointment is said to be illegal were appointed from before his posting as Superintending Engineer in the said Circle and the alleged extension of their services was granted during the period 29th June, 1996 to 10th January, 1997. He further stated that during the aforesaid period only a sum of Rs.1,72,522/- was paid to the said clerks and there is no relevance to the amount of Rs.9,70,392/- referred to in the notice as far as the petitioner is concerned. He further stated that the payments were made to those clerks for the duties discharged by them on their respective posts by the respective Executive Engineers and their services were also extended pursuant to the recommendations made by the respective Executive Engineers taking into consideration the exigency of work as in their respective Divisions required number of Accounts Clerk as



per the work load were not available. He also stated that the show cause notice issued to him after 16 years of the alleged misconduct and after almost three years of his retirement is not tenable in law in view of the provisions prescribed under Rule 139 of the Rules. He, therefore, requested to accept the cause shown and drop the proceeding initiated against him.

4. Later on, the Respondent-State vide impugned order dated 21st May, 2013 while rejecting the cause shown by the petitioner directed him to deposit Rs.9,70,392/- failing which it has been ordered that his pension would be revised. It is stated in the impugned order that the show cause notice was issued to the petitioner after obtaining opinion of the Law Department and with consent of the General Administration Department. Hence, the notice was legal and valid. It is also stated that the very appointment of the employee Md. Parwej Akhtar Ansari was found illegal in C.W.J.C. No. 3837 of 2012 and a direction was made by the Court to recover the salary paid to him from the officers concerned.

5. Mr. Sanjeev Kumar, learned counsel for the petitioner strongly assailed the impugned order. He has submitted that as per the mandate of Rule 139 of the Rules, the reduction of amount of pension or revision of pension can be done only after the satisfaction of the State Government that the service of the petitioner was not



thoroughly satisfactory or that there was gross misconduct on his part while in service. He submitted that in order to reduce the quantum of pension and recovery of amount in exercise of powers under Rule 139 of the Rules, it must be shown that the service rendered by the petitioner was not found thoroughly satisfactory. According to him, in the present case, the respondents have neither come to the conclusion that the service rendered by the petitioner was not thoroughly satisfactory nor that there was any adjudication by the respondents that the petitioner has conducted gross misconduct. He has contended that by only giving a show cause notice and not accepting the reply submitted by the petitioner, the respondents could not have held the petitioner guilty of gross misconduct.

6. He has further contended that the order of this Court passed in C.W.J.C. No. 3837 of 2012 was in relation to the petitioner of that particular case. Further, this Court had directed the respondents to initiate enquiry with regard to the person, who made appointment, and to make recovery from those persons of the salary paid to the petitioner of that case. However, in the present case, the respondents have not made any enquiry rather they have only issued show cause notice under Rule 139 of the Rules to the petitioner and when the petitioner replied the same on technicality of the notice along with explanation of innocence in respect of charges, then the



respondents found the reply submitted by the petitioner to be unsatisfactory and ordered for recovery of the loss amount of Rs.9,70,392/-. He has submitted that the petitioner has not been given proper and reasonable opportunity to defend his case.

7. The State has contested the matter. Mr. Anil Kumar Sinha, learned Government Advocate No.1 appearing on behalf of the State has contended that one Md. Parvej Akhtar Ansari had filed writ application bearing C.W.J.C. No. 3837 of 2012 before this Court questioning the order by which he was removed from service and his prayer for regularization in service was declined and after hearing the parties, this Court had directed to initiate enquiry with regard to the persons, who made appointment of Mr. Ansari and its continuance leading to the claimed regularization and initiate appropriate civil and/or criminal proceeding against those who abused public powers given to them in trust with regard to appointment on a public post. The respondents were also required to take appropriate steps for recovery of the salary paid to Mr. Ansari from such persons, who may be responsible for his illegal appointment and continuance in service. He has contended that in this regard an enquiry was conducted and it was found that certain officers including the petitioner were responsible for appointment and extension of service of Mr. Ansari and two other similarly situated persons. Accordingly,



in obedience to the order passed by this Court, a show cause notice was issued to the petitioner on 14th March, 2013 and after considering the reply submitted by him, the petitioner has been directed to deposit Rs.9,70,392/- in the concerned Government head failing which it has been ordered that steps would be taken for revision of his pension amount. He has contended that the termination of service of Mr. Ansari was found proper even by this Court and, hence, the action taken by the respondents-State cannot be said to be arbitrary. Mr. Sinha has alternatively submitted that even if the impugned order has not been made *stricto sensu* under Rule 139 of the Rules referred to in the show cause notice, the same would not be bad for the simple reason that the order making authority has the jurisdiction to make the order under Rule 43(b) of the Rules. He submitted that the reference to wrong provision of law will not vitiate the order.

8. I have heard respective counsel for the parties and perused the record.

9. I find substance in the argument advanced by the learned counsel for the petitioner. The provisions of Rule 43(b) and Rule 139 of the Rules are completely different in their nature, scope and ambit. In order to appreciate the contention of the parties, it would be appropriate to extract Rule 139 and Rule 43(b) of the Rules, which are as under :-

“139 (a) The full pension admissible under the rules is



not to be given as a matter of course, or unless the service rendered has been really approved.

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

(c) The State Government reserve to themselves the powers of revising an order relating to pension passed by subordinate authorities under their control, if they are satisfied that the service of the pensioner was not thoroughly satisfactory or that there was proof of grave misconduct on his part while in service. No such power shall however, be exercised without giving the pensioner concerned a reasonable opportunity of showing cause against the action proposed to be taken in regard to his pension, nor any such power shall be exercised after the expiry of three years from the date of the order sanctioning the pension was first passed.”

“43 (b) The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement:

Provided that-

(a) such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment;

(i) shall not be instituted save with the sanction of the State Government;

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings; and

(iii) shall be conducted by such authority and at such place or places as the State Government may direct and in accordance with the



procedure applicable to proceedings on which an order of dismissal from service may be made;

(b) judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment, shall have been instituted in accordance with Sub-clause (ii) of clause (a); and

(c) the Bihar Public Service Commission, shall be consulted before final orders are passed.

Explanation- For the purposes of the Rule-

(a) departmental proceeding shall be deemed to have been instituted when the charges framed, against the pensioner are issued to him or, if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to have been instituted:

- (i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to a criminal court; and
- (ii) In the case of civil proceedings, on the date on which the Complaint is presented, or as the case may be, an application is made to a civil Court.”

10. It would be evident from perusal of Rule 139 of the Rules that it empowers the authority sanctioning pension or the State Government to make an overall assessment of the service of the concerned employee and to suitably reduce the amount of pension if his service has not been found thoroughly satisfactory. It would also be evident that full pension admissible under the Rules is not to be given as a matter of course, unless the service rendered has been really approved. However, no such power of reduction in the amount



of pension can be exercised without there being proof of the service being not thoroughly satisfactory or proof of gross misconduct. Here in the present case it is not the case of the respondents that the service of the petitioner was not thoroughly satisfactory rather the respondents want to recover the amount as the petitioner had extended service of some of the clerks who were allegedly illegally appointed by some other officer. In view of the provision prescribed under Rule 139 of the Rules, this Court is of the opinion that in order to recover a loss caused to the State Government as a result of some specific and individual act of misconduct by an employee the said provision cannot be invoked for the simple reason that there is a separate rule under 43(b) of the Rules specifically for that purpose with the bar of limitation provided therein.

11. So far as the alternative argument advanced by the learned counsel for the State is concerned, it is true that mere mention of wrong provision of law could not vitiate the order. In *Collector Of Central Excise, ... vs Pradyumna Steel Ltd. [(2003) 9 SCC 234]*, the Supreme Court has observed “It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power”. However, it is to be seen whether the respondent-State could have passed the impugned order



even in exercise of power conferred under Rule 43(b) of the Rules.

12. It is not in dispute that there was no proceeding initiated against the petitioner before his attaining the age of superannuation on 31st July, 2010. The proceeding was initiated against him with issuance of show cause notice dated 14th March, 2013 under Rule 139 of the Rules, which confers the authority sanctioning the pension and the State Government power to make reduction in the amount of pension. Rule 43(b) of the Rules confers the State Government a right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period if the pensioner is found in departmental or judicial proceeding guilty of grave misconduct; or to have caused pecuniary loss to the Government by misconduct or negligence during his service including service rendered on re-employment. In addition to that, if an employee is held guilty of causing pecuniary loss to the employer as a result of gross misconduct, then also full or part of pension payable to him can be stopped. Proviso (a)(iii) of Rule 43(b) of the Rules deals with the situation where departmental proceeding was not instituted while the Government servant was on duty. The said proviso mandates that the procedure adopted for imposing punishment of dismissal from service should be adopted while imposing punishment of withholding pension or part of it, if such proceeding is initiated after



superannuation of the employee.

13. Further, there is a rider under clause (a)(ii) of Rule 43(b) of the Rules which mandates that such departmental proceeding if not instituted while the Government servant was on duty either before his retirement or during re-employment, the same shall be instituted only in respect of an event which took place not more than four years before the institution of such proceeding.

14. Admittedly, the event in the present case relates to the period between 17th June, 1995 to 11th February, 1997 when the petitioner was posted as Superintending Engineer, Road Circle, Darbhanga. He retired from service on attaining the age of superannuation on 31st July, 2010. Immediately after his retirement, the Government has sanctioned him his full pension and he is getting his regular pension since 1st August, 2010. There is no dispute to the fact that while in service no disciplinary proceeding was ever initiated against the petitioner. Under such circumstances, the impugned show cause notice issued to the petitioner along with charge-sheet in Prapatra-(k) was impermissible in law as the alleged event had taken place more than 15 years before the issuance of the impugned show cause notice to the petitioner.

15. Further, the order impugned could not have been passed in exercise of power under Rule 43(b) of the Rules as the same



requires the procedure to be adopted for imposing punishment of dismissal from service. Unless such a procedure was adopted while imposing any punishment under Rule 43(b) of the Rules, the order cannot be held to be justified. Also, the impugned order is quasi judicial in nature and it affects the petitioner's right to property and causes financial prejudice to him. Such an order could not have been passed by merely asking a reply to the show cause notice. The petitioner was a Gazetted Class-I Officer under the State of Bihar. Rule 55 of the Civil Services (Classification, Control & Appeal) Rules, 1930 would apply in his case for imposing punishment of dismissal from service. No proper proceeding in terms of Rule 55 of the Civil Services (Classification, Control & Appeal) Rules, 1930 was ever initiated against the petitioner. The tenor of show cause notice also goes to show that the issuance of notice was a mere formality and a post-decisional notice was issued to the petitioner and on receipt of the reply to the notice, final order was passed directing the petitioner to pay Rs.9,70,392/-. In the opinion of this Court, mere opportunity to show cause does not meet the requirement of fair procedure and Rule 55 of the Civil Services (Classification, Control & Appeal) Rules, 1930. Hence, I do not find any merit in the alternative argument advanced on behalf of the State.

16. So far as the direction given by this Court in C.W.J.C.



No. 3837 of 2012 is concerned, I would like to observe that while directing the respondents to initiate an enquiry with regard to the persons, who made appointment of the petitioner of that case leading to the claimed regularization, this Court had certainly directed the respondents to take appropriate steps for recovery of the salary paid to the petitioner of that case. The observation of this Court made in C.W.J.C. No. 3837 of 2012 cannot be interpreted as an open license to the Respondents-State to recover the salary paid to the petitioner of that case from the official(s) without following the procedures prescribed in law. By no stretch of imagination, the order impugned can be said to be the appropriate step as directed by this Court.

17. For the reasons discussed above, I find and hold that the impugned order dated 21st May, 2013 passed by the respondents, as contained in Annexure-3, is bad and illegal. Accordingly, it is set aside and quashed.

18. In the result, this writ application is allowed but with no order as to costs.

(Ashwani Kumar Singh, J)

Pradeep/-

AFR/NAFR	NAFR
CAV DATE	---
Uploading Date	15-12-2016
Transmission Date	

