

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11738 of 2008

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Arjun Prasad Chauhan, son of late Dhau Prasad Chauhan, resident of Village-
Belagan, P.O.- Araudi, P.S. Miskaur, District- Nawada.

.... Petitioner.

Versus

1. The State of Bihar, through the Chief Secretary, Government of Bihar, Patna.
2. The D.G. cum I.G. of Police, Bihar, Patna.
3. The D.I.G. of Police, Central Range, Patna.
4. The S.P. Nalanda.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Ram Hriday Prasad, Advocate
Mrs. Maruti Kumari, Advocate

For the Respondent/s : Mr. Shiv Kumar, AC to GA-7

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

ORAL JUDGMENT

Date: 08-01-2016

Heard learned counsel for the petitioner and the respondents.

2. The petitioner was appointed as a constable in 1999 on probation of two years. He was dismissed from service by order dated 08.01.2001 of the Superintendent of Police w.e.f. 24.02.2000 for being on unauthorized leave throughout from 24.02.2000 under Rule 668 of the Bihar Police Manual. The appeal and Memorial filed by the petitioner was rejected by the Deputy Inspector General of Police, Central Range, Patna and Director General of Police, Bihar vide order dated 15.01.2005 and 21.10.2008.

3. The petitioner has assailed the order of his dismissal, which has been affirmed up to the Director General of Police, Bihar.

4. The petitioner had earlier challenged the order of dismissal in C.W.J.C. No. 6067 of 2015, which was disposed of on 18.09.2007 with a direction to the Deputy Inspector General of Police, Central Range, Patna to dispose of the appeal within two months.

5. The case of the petitioner is that he applied for one day Casual Leave and one day Earned Leave, as his son fell ill. The petitioner too fell ill and was treated by Dr. Shatrughan Prasad Singh, Jail Road, Nawada from 03.01.2000 to 14.01.2000. Thereafter he was treated by police doctor, Nalanda and one Dr. Awadhesh Prasad. He also filed an application for leave on 03.02.2000. However his condition did not improve and he was subsequently treated by Dr. Jamun Prasad Sinha, Gaya in the month of May, 2000. The petitioner has attached doctors' certificates and some prescriptions in support of his case that he could not attend the probation because of his ailment. He has assailed the impugned order being passed, without adhering to the principles of natural justice. His further case is that he has been dismissed from service without providing an opportunity to explain his case. He next submits that the order is stigmatic and as such the rules of principles of natural justice ought to have been followed.

6. Counsel for the State has justified the impugned actions. He submits that the petitioner remained on unauthorized absence from 24.02.2000, without any information much less with approval. He



submits that it is not necessary to give opportunity to a person, who is under the period of probation in view of Rule 668 of the Bihar Police Manual. Furthermore, the petitioner had not come to this Court with clean hands, in so much so that the appeal of the petitioner was dismissed in the year 2005, still at the time of disposal of C.W.J.C. No. 6067 of 2005 on 18.09.2007, he did not disclose that the appeal was already decided. In absence of such disclosure, the writ Court directed the Deputy Inspector General of Police, Central Range, Patna to dispose of the appeal.

7. I have heard the counsel for the parties. The main issue in this case is whether a police constable, who is on probation, can be dismissed from service even without adhering to the principles of natural justice.

8. Before I consider this question, it would be necessary to deal with the submission of the State that the petitioner has not moved this Court with clean hands. Counsel for the State submits that the petitioner filed an appeal on 24.08.2004, which was dismissed on 13.01.2005. The petitioner thereafter filed writ application bearing C.W.J.C. No. 6067 of 2005, which was disposed of on 18.09.2007 directing the Deputy Inspector General of Police, Central Range, Patna to dispose of the appeal within two months. The petitioner did not disclose on the date of disposal of writ application on 18.09.2007



that the appeal was already dismissed on 13.01.2005. I find the reply of the petitioner that he was unaware of the order of dismissal, as the same was not communicated to him, not unconvincing. It would appear from the order of dismissal contained in Annexure-11 that the copy of the same was at least not forwarded to the petitioner. Furthermore, the State Government, which is a custodian of the record, too did not disclose in its counter affidavit that the appeal was disposed.

9. This takes us to the main issue of the case, whether a constable on probation can be dismissed from service without adhering to the principles of natural justice or without giving a show-cause to explain his case.

10. The issue whether a probationer can be dismissed from service was a subject of consideration in case of **Anoop Jaiswal v. Government of India and another**, reported in **AIR 1984 SC 636**. In the case, a Government servant was discharged during the period of his probation. Laying down the law, the Hon'ble Apex Court observed that an order of discharge even in case of probationer would fall to the ground, if he has not been afforded a reasonable opportunity to defend himself as provided in Art. 311 (2) of the Constitution. Para 13 of the judgment is quoted herein below for easy reference:

“13. In the instant case, the period of probation had not



yet been over. The impugned order of discharge was passed in the middle of the probationary period. An explanation was called for from the appellant regarding the alleged act of indiscipline, namely, arriving late at the Gymnasium and acting, as one of the ring leaders on the occasion and his explanation was obtained. Similar explanations were called for from other probationers and enquiries were made behind the back of the appellant. Only the case of the appellant was dealt with severely in the end. The cases of other probationers who were also considered to be ring leaders were not seriously taken note of. Even though the order of discharge may be non-committal, it cannot stand alone. Though the noting in the file of the Government may be irrelevant, the cause for the order cannot be ignored. The recommendation of the Director which is the basis or foundation for the order should be read along with the order for the purpose of determining its true character. If on reading the two together the Court reaches the conclusion that the alleged act of misconduct was the cause of the order and that but for that incident it would not have been passed then it is inevitable that the order of discharge should fall to the ground as the appellant has not been afforded a reasonable opportunity to defend himself as provided in Art. 311 (2) of the Constitution.”

11. In the light of the law laid down by Hon'ble Apex Court, I find that the petitioner has been dismissed during probation on the



allegation of being on unauthorized leave from 24.02.2000 till the date of dismissal, on 01.08.2000. The order is definitely punitive and cast a stigma on his conduct and as such an order dismissing a probationer ought not to have been passed without affording him an opportunity in view of law laid down by the Hon'ble Apex Court in case of Anoop Jaiswal v. Government of India and another (Supra). Thus, a probationer too could not be discharged without affording an opportunity to explain his case.

12. The State by referring Rule 668 of the Bihar Police Manual submits that a probationer at anytime without providing an opportunity of hearing can be dismissed during the probation period. In order to appreciate the submission, it would be relevant to notice the Rule 668 of the Bihar Police Manual, which is quoted herein below:

668. Removal or reversion of officers appointed direct or promoted on probation.- The following rules shall govern first appointments and the promotion of police and ministerial officers as detailed in Appendix 41:-

(a) All officers shall in the first instance be appointed or promoted on probation. Where the period of probation is not otherwise provided for in the rules it shall be for a period of two years in the case of executive officers and one year in the case of ministerial officers. The authority authorised to



make such appointment or promotion, may at any time during such probationary period and without the formalities laid down in rule 828, remove an executive officer directly appointed or revert such an officer promoted who has not fulfilled the conditions of his appointment or who has shown himself unfit for such appointment or promotion. Similarly probationary period may also be extended without any show cause. No appeal shall lie in such cases.

(b) Executive Officers appointed or promoted in other than permanent vacancies are also liable to removal or reversion in the manner indicated in clause (a) above.

13. Counsel for the State submits that as per the provisions the authority authorized to make such appointment or promotion, may at any time during such probationary period and without the formalities laid down in rule 828 of Bihar Police Manual, remove an executive officer directly appointed or revert such an officer promoted who has not fulfilled the conditions of his appointment.

14. Learned counsel for the State thus submits that Rule 828 (b), which provides for providing adequate opportunity of defending oneself, has been dispensed with, in case of probationer, if he has not fulfilled the conditions of his appointment or shown himself unfit for such appointment or promotion.



15. In my view, the State has not been able to appreciate the import of two provisions, namely, Rule 668 and 828 of Bihar Police Manual correctly. Firstly, the rule is applicable to police and ministerial officers. Even if we stretch the same to include a constable, who would not come either within the category of police and ministerial officers, still Rule 828 of Bihar Police Manual does not state that ‘no opportunity’ of hearing is to be provided. It would appear from plain reading of Rule 828 that no order of dismissal or removal, compulsory retirement or reduction shall be passed on any police officer without providing an adequate opportunity of defending himself. The word ‘adequate opportunity’ mentioned in the Rule refers to sufficient opportunity and would not mean, providing of ‘no opportunity’. So what has been dispensed by Rule 668, is providing of adequate opportunity and not of providing ‘any opportunity’ and ‘no opportunity’. The Rule in no manner dispense with providing of any opportunity or no opportunity. Rule 828 of the Bihar Police Manual, 1978 is quoted herein below:

828: *Infliction of major punishments.*- (a) Of the punishments permitted by rule 824, the items in serials (a) to (f) of that rule shall be regarded as major punishments, and shall be inflicted by an officer not below the rank of Superintendent.

(b) Without prejudice to the provision of the Public Servants Enquiries Act, 1850, no order of dismissal,



removal, compulsory retirement or reduction shall be passed on any police officer (other than an order based on facts which have led to his conviction in a criminal court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself.

© In case in which, forfeiture of increment is proposed to be an adequate punishment, this may be inflicted without formal enquiry in the form of a proceeding but every such matter shall state clearly: first, the charges against the defaulter; then his answers to each charge, one by one; and lastly, the finding upon each charge of the officer inflicting the punishment. In such cases, the Superintendent need not hold the enquiry himself, nor shall the delinquent have the right to appear before him, but he has the right to appear before the officer deputed to record the evidence and to take his defence; and such officer, who shall not be below the rank of inspector, shall come to a clear finding on each charge and shall submit the record with his recommendations to the Superintendent for orders.

(d) These provisions shall not be followed when the Governor is assured that it is not possible to do this in the interest of the safety of the State according to Article 311 (2) of Indian Constitution or it is not possible to follow these provisions entirely and there is no suspicion that in not following them the accused may not get justice. Whenever such a possibility arises,

the officer who is competent to remove or reduce delinquent in the rank shall formally give orders as decided by the Governor which shall be considered final.”

16. Explaining the difference between the term ‘adequate opportunity’ and ‘no opportunity’, the Hon’ble Apex Court in case of State Bank of Patiala & Ors. Vs. S. K. Sharma, reported in (1996) 3 SCC 364 observed that the term no adequate opportunity or no fair hearing is different from not providing any opportunity of hearing. In case of former (i.e. No Opportunity) there is total violation of natural justice (rule of audi alteram partem) and in latter there is violation of a facet of the said rule. In other words, a distinction must be made between “no opportunity” and no adequate opportunity, i.e. between “no notice” / “no hearing” and “no fair hearing”. Where the statute requires an adequate and fair hearing, all reasonable opportunity is to be provided to the delinquent. Sub para 5 of para 33 of the judgment is quoted herein below for easy reference:

33. (5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a



total violation of natural justice (rule of audi alteram) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "no adequate opportunity, i.e., between "no notice"/"no hearing" "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid [one may call it "void" or a nullity if one chooses to]. In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation [of a facet of the rule of audi alteram] has to be examined from the standpoint of prejudice; in other word in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

17. In other words, the rule does not state that opportunity should not be granted to a probationer while terminating his service. There could not have been total violation of principles of natural

justice, while even removing a person during his probation. In my considered view, the petitioner was at least entitled to a show-cause, if not a regular proceeding or adequate opportunity as envisaged under Rule 828 of the Bihar Police Manual, as applicable to a regular police employee or officer.

18. Rule 668 does not state that a probationer can be removed without the formalities laid down for inflicting minor punishment under the Rule.

19. In view of the discussions made above, it is evident that service of a probationer could not have been dispensed in total violation of the principles of natural justice or without providing any opportunity.

20. In the result, the impugned order of dismissal affirmed in appeal and Memorial are set aside. The matter is remitted to the disciplinary authority with liberty to proceed afresh after providing a show-cause notice to the petitioner.

21. It is expected that the proceeding should be concluded within a period of six months from the date of production of appeal.

22. Let a copy of this order be communicated to the Superintendent of Police, Nalanda, Deputy Inspector General of Police, Central Range, Patna as well as the Director General of Police, Bihar, Patna.

23. With the aforesaid observation, this application stands
disposed of.

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(Samarendra Pratap Singh, J.)