

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1760 of 2014

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Khwaja Gholam Rasul, Son of Late Khwaja Gholam Mustafa, Resident of Village Achchepur, P.S. Baisi, District – Purnia.

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Education Department, Government of Bihar, Patna.
2. The Principal Secretary, Education Department, Government of Bihar, Patna.
3. The Director (Administration) Cum Addl. Secretary, Education Department, Government of Bihar, Patna.
4. The Director (Secondary Education), Education Department, Government of Bihar, Patna.
5. The Conducting Officer –cum- Joint Secretary, Education Department, Government of Bihar, Patna.
6. The Presenting Officer –cum- Section Officer, Education Department, Government Of Bihar, Patna.
7. The Chairman, Bihar Public Service Commission, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sarvadeo Singh, Advocate
Mr. Md. Anjum Akhter, Advocate

For the Respondent/s : Mr. P.K. Verma, AAG-3
Mr. S.K. Sharma, AC to AAG-3

For the Responder-BPSC : Mr. Prashant Kr. Chaudhary

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 01-09-2016

Heard Mr. Sarvadeo Singh, learned counsel for the petitioner, Mr. P.K. Verma, learned Additional Advocate General No.3 for the State and Mr. Prashant Kumar Chaudhary, learned counsel appearing for the B.P.S.C.

The petitioner questions the order dated 8.8.2013 of the Director (Administration) –cum- Additional Secretary, Education Department, Government of Bihar, Patna whereby in exercise of powers vested under rule-43(b) of the Bihar Pension Rules, 1950

(hereinafter referred to as 'the Rules') a penalty of deduction of 10% from the pension of the petitioner has been imposed.

In the nature of the order which this Court intends to pass it would not be required to discuss the matter threadbare. The facts of the case briefly stated is, that the petitioner was proceeded against by service of a charge-sheet, a copy of which is present at Annexure-2 on allegations that he allowed one Ali Imam to continue beyond the tenure of his appointment and thus caused financial loss to the Government revenue while providing unjust gains to the said Ali Imam. The petitioner was compulsorily retired by order dated 12.2.2009 which was questioned by him through CWJC No.5249 of 2009. A Bench of this Court vide order dated 25.6.2010 allowed the writ petition quashing the order of compulsory retirement and directed the disciplinary authority to restart and complete the departmental proceedings in a legal manner. The operative portion of the order runs as under:

“Considering all these facts, I find that the major punishment has been awarded without following the procedure for holding a departmental proceeding, which amount to violation of Rule of Natural Justice. Accordingly, the impugned order dated 12.2.2009 contained in Memo No.46 issued by Director (Administration) –cum- Joint Secretary, Department of Human Resources Development, Government of Bihar, Patna, is quashed.

The Director (Administration) –cum- Joint Secretary, Department of Human Resources Development, Government of Bihar, Patna, is directed to restart the departmental proceeding in a legal manner. Enquiring Officer and Presenting Officer be

appointed, all relevant documents be supplied to the petitioner on which reliance has been place by the respondent authorities. He should be allowed to examine/cross-examine witnesses. Second show cause notice with the enquiry report be served to the petitioner. In this way, following all procedures the departmental proceeding should be completed within six months from the date of production/communication of this order.

The respondents will comply the direction and complete the departmental proceeding in the legal manner within the specified time.

The petitioner shall be allowed to join and get all consequential benefits, till disposal of the departmental proceeding.

This application is allowed.”

The State not being satisfied by the order filed two modification application praying for extension of time for initiation of departmental proceedings and for modifying the direction allowing the petitioner to join the post with consequential benefits. The Bench in consideration of the prayers made in the miscellaneous application giving rise to M.J.C. No.4921 of 2010, rejected both the prayers and dismissed the miscellaneous application vide order passed on 30.3.2011, a copy of which is present at Annexure-7. In between the period, the petitioner reached the age of superannuation on 31.1.2011.

Here it would be relevant to mention that although the order of compulsory retirement had since been quashed by this Court on 25.6.2010 and even the modification prayed by the State to the directions of the Court allowing him to rejoin the post, having



been rejected, yet the petitioner was not allowed to join and he remained in a state of compulsory retirement. Despite this position the charge-sheet was served upon him in such state on 19.11.2010 vide Annexure-6. Though the petitioner disputes its service but a reply filed on his behalf present at Annexure-8 takes no note of any such objection rather the charges have been repelled by the petitioner on grounds that he had no intimation either regarding the order dated 26.5.1988, whereby the services of Ali Imam was dispensed with nor there was any document served on him which would have indicated his tenure of service. The Enquiry Officer submitted his report to hold the charges proved, a copy of which is placed at Annexure-A to the counter affidavit which is dated 31.5.2011 and the disciplinary authority in consideration of the nature of allegation, the stand of the petitioner and the enquiry report has been pleased to pass the order of penalty under rule-43(b) of 'the Rules' directing for deduction from pension @ 10% vide order bearing Memo No.379 dated 8.8.2013. The petitioner feeling aggrieved is before this Court.

In between and much after the service of charge-sheet on 19.11.2010 that vide order bearing No.209 dated 9.3.2011 a decision was taken to accept the joining of the petitioner with effect from 8.7.2010 until his superannuation on 31.1.2011. Meaning thereby the petitioner attained the age of superannuation in a state



where despite the order of the High Court he was not permitted to join and his joining has been accepted after reaching the date of superannuation on 31.1.2011 vide notification No.209 dated 9.3.2011 which is reflected from the order bearing no.422 dated 24.3.2011 passed by the Director (Administration) –cum- Joint Secretary, Department of Human Resources Development, Government of Bihar, Patna annexed at Annexure-13 to the writ petition.

While it is the argument of Mr. Sarvadeo Singh, learned counsel appearing for the petitioner that the order of penalty is based on no evidence, it is contested by Mr. Verma in reference to the enquiry report to submit that the petitioner had full knowledge about the tenure of the said Ali Imam expiring on 15.7.1988, yet allowed him to continue until 5.8.1988. According to Mr. Verma, the petitioner provided him with unjust pecuniary benefit to which he was not found entitled and in the manner had caused financial loss to the Government revenue.

During the course of argument an issue arose as to whether in view of the directions passed by this Court in CWJC No.5249 of 2009 present at Annexure-3 requiring the respondents to conclude the proceedings within 6 months and which period was not extended by the Bench despite the modification application being filed giving rise to M.J.C. No.4921 of 2010 vide Annexure-7,

whether the proceedings can be held valid, having gone beyond the period of 6 months.

On such query being posed to Mr. Verma, learned A.A.G.-3, he while admitting to the fact that neither the order passed by the writ court present at Annexure-3 nor the rejection of the modification present at Annexure-7, was questioned by the State before the superior forum, has tried to justify the action impugned by submitting that the direction of the writ court did not reflect that a failure to complete the exercise within a period of 6 months would render it invalid because the direction is not preceded with the word 'shall' and thus the direction was not mandatory.

According to Mr. Verma, the period stipulated being preceded with the word 'should', does not mean that the proceedings had to be completed within 6 months and even though a modification application filed for extension of the date for initiation of proceedings was rejected, there was no prayer for an extension of the date of completion. It is further argued that since no consequence is mentioned in the order for a failure on the part of the State to complete the proceedings within 6 months, it would not enure to the benefit of the petitioner. Mr. Verma has referred to the enquiry report and with particular reference to the observations at running page 67 of the writ proceedings, he submits that the finding

of the Enquiry Officer is sufficient to uphold the charge against the petitioner since despite taking notice of the fact that the service tenure of the said Ali Imam ended in July 1988, he has yet proceeded to pay the salary to the said Ali Imam for the period 15.7.1988 until 5.8.1988 on the pretext that he has discharged the duty until the said period.

I have heard learned counsel for the parties and I have perused the record.

In my opinion the impugned order cannot be upheld for more than one reason namely:

- (a) The order of compulsory retirement of the petitioner was questioned by the petitioner in CWJC No.5249 of 2009 and was quashed by this Court on 25.6.2010.
- (b) The State in not taking any steps to question the order of the writ court present at Annexure-3 before a superior forum, it has attained finality and is binding on them. The order of the writ court was in two parts namely:-
 - (i) Completion of disciplinary proceedings in 6 months'; and
 - (ii) Reinstatement with consequential benefits.
- (c) The directions contained in the order of the writ court present at Annexure-3 left no confusion that a duty was cast on the respondents to conclude the proceedings



within 6 months from the date of production of a copy of the order. The argument of Mr. Verma that the word 'should' does not reflect a mandatory nature of direction is only taken to be rejected for a direction which bears a command by the word 'should', is incapable of any misinterpretation. Even otherwise, any confusion prevailing in the mind of the State stood resolved in the order of this Court present at Annexure-7 when a modification application filed by the State was rejected. Whether the respondents were seeking extension of the date for initiation of proceedings or for concluding the same would make no difference because whatsoever extension was sought by the respondents, stood rejected.

- (d) The rejection of modification not having been questioned by the State before the superior forum, the issue stands concluded and any kind of explanation given by Mr. Verma, learned AAG-3 cannot bail out the State from the conclusive feature of the contest.
- (e) Despite the writ court directed for joining of the petitioner with consequential benefits and the prayer for modification of the relief was rejected vide order dated 30.3.2011 placed at Annexure-7 but the petitioner was not reinstated and he reached the age of superannuation

on 31.1.2011. Meaning thereby the petitioners reached the age of superannuation in a state where the State Government did not allow him to join the post.

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- (f) Although the petitioner was not allowed to join on his post but a charge-sheet was sought to be served vide memo dated 19.11.2010 present at Annexure-6 which is illegal for until such time the petitioner is allowed to join his post, he could not have been served with a charge-sheet.
- (g) The order of reinstatement was passed after the petitioner reached the age of superannuation on 31.1.2011 vide notification bearing No.209 dated 9.3.2011 with retrospective effect from 8.7.2010. Even though this order accepts joining of the petitioner retrospectively and would entitle him in service benefits but it would not validate the service of charge-sheet present at Annexure-6 because at that stage, the petitioner was yet to be reinstated.
- (h) The enquiry report admits that the letter bearing No.5333 dated 26.5.1988 of the Regional Deputy Director of Education, Dumka whereby the appointment of Ali Imam had been cancelled, was not available and had been misplaced. Meaning thereby the petitioner had no

knowledge about the termination of service of the said Ali Imam.

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- (i) The enquiry report at page 67 takes notice of the steps taken by the petitioner and no sooner did he gather knowledge regarding the tenure of the said Ali Imam during the course of preparation of the salary, the petitioner while not allowing him to function any further, has made payment for the period he worked i.e. from 15.7.1988 until 5.8.1988.
- (j) Even if there be an error in the judgment of the petitioner in making payment of salary to the said Ali Imam for the period he has worked, in absence of any evidence to show that the decision of the petitioner to make payment to the said Ali Imam for the period he has admittedly worked, i.e. 15.7.1988 to 5.8.1988, is a deliberate act, an act of defiance and in the teeth of the orders issued, it cannot be held a misconduct for inviting a punishment under the Pension Rules.

In my opinion the entire proceeding right from the stage of service of charge-sheet up to the order of punishment is neither sustainable on merits nor could have continued after expiry of 6 months from the date of order passed by the writ court. The proceeding was also invalid in view of the fact that the charge-sheet

was served on the petitioner without allowing reinstatement, which was allowed on 9.3.2011 though the petitioner had already reached superannuation on 31.1.2011. There is again complete absence of evidence to drive home the charge of misconduct.

The entire proceedings together with the order of penalty is held illegal and is accordingly quashed and set aside. The pension of the petitioner stands restored and the deduction made from the pension of the petitioner should be refunded expeditiously and preferably within a period of three months from the date of receipt/production of a copy of this order.

The writ petition is allowed.

(Jyoti Saran, J)

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AFR	
CAV DATE	
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