IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.2193 of 2016
In
Civil Writ Jurisdiction Case No.16573 of 2011

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1. The State Of Bihar through the Principle Secretary Home Govt. of Bihar, Patna.
2. The Director General of Police, Bihar, Patna.
3. The Inspector General of Police Bhagalpur, Range, Bhagalpur.
4. The Deputy Inspector General of Police, Personnel Bihar, Patna.
5. The Deputy Inspector General of Police Eastern Region, Bhagalpur.
6. The Superintendent of Police, Banka.

... ... Appellant/s

Versus

Shyam Kumar Son of late Uday Narain Singh Resident of Village- Bajidpur, P.S. Ghoshi, District Jehanabad.

... ... Respondent/s

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Appearance :

For the Appellant/s : Mr. Subodh Kumar, AC to SC 26
For the Respondent/s : Mr. Shivendra Kumar Sinha, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 09-10-2017

Delay of 88 days in filing of the appeal is condoned and I.A. No.9305 of 2016 stands allowed and disposed of.

This appeal has been filed by the State Government seeking exception to an order dated 4.8.2016 passed in C.W.J.C. No.16573 of 2011. There being a delay of 88 days in filing of the appeal, I.A. No. 9305 of 2016 has been filed seeking condonation of delay.

The respondent employee was working in the Police Department and vide order dated 6.8.2011, the Deputy Inspector General of Police, Eastern Region, Bhagalpur compulsorily retired the petitioner from service. The controversy before the learned Writ Court was as to whether the Deputy Inspector General has power to compulsorily retire the employee from service. The learned Writ Court took note of the provisions of Rule 74(a) of the Bihar Service Code and found that it is only the State Government which can take action in the matter and as the Deputy Inspector General has no power to compulsorily retire the employee, the action was unsustainable and, therefore, quashed the order and directed for permitting the petitioner to work till his actual date of superannuation and to pay him all the consequential benefits.

Aggrieved with the order, this appeal has been filed and two grounds are canvassed in this appeal before this Court. The first one is that there was a wrong nomenclature under which the action was taken. It was argued that action was taken under Rule 74(b)(iii) of the Bihar Service Code and not under Rule 74(a) and the second ground was that even without there being an affidavit to the effect that the respondent employee was unemployed during the period he remained out of service, back wages have been ordered to be paid treating the petitioner to have retired on the date of superannuation i.e. 29.2.2016. Accordingly on both these counts, the appeal has been filed.

Learned counsel for the respondent refuted the aforesaid submissions and argued that in this case when the case of the petitioner was moved for promotion, the Deputy Inspector General of Police ordered impugned action and passed the order in question without complying with the mandatory requirement of issuing three months' notice or payment of pay in lieu of three months' notice as contemplated under Rule 74(b)(iii) of the Code and, therefore, the action is unsustainable.

As far as the second ground is concerned, he argues that this is not a case of dismissal from service. It is a case of compulsory retirement and, therefore, the question of the employee being not gainfully employed or otherwise will not arise as the employee was receiving pensionary benefits.

We have considered the rival contentions and we find that Rule 74(a) and 74(a) (iii) of the Code reads as under:

> "74(a): The State Government may require any Government servant who has completed twenty one years of duty and twenty-five years of total service calculated from the date of his first appointment to retire from Government service, if it considers that his

> efficiency or conduct is not such as to justify his retention in service. Where any Government servant is so required to retire, no claim to any special compensation shall be entertained.
>
> 74(b)(iii): A Government servant who retires voluntarily is required to retire in public interest under this rule on attaining the age of 50 years, or completing qualifying service of 30 years, shall be entitled to retiring pension and death-cum-retirement gratuity."

Admittedly, the order in question has not been passed by the State Government and it is the case of the appellants before us that the Appellate Authority, D.G. Board has taken action under Section 74(b)(ii). However, even for taking action under Section 74(b)(ii), the appointing authority is required to issue three months' notice to the employee concerned in writing intimating to him about his intention to compulsorily retire him after completing thirty years of qualifying service or in lieu of service he has to be paid three months' salary. Admittedly, in this case the aforesaid mandatory requirement has not been complied with. Instead, while scrutinizing the case of the petitioner for grant of promotion, the impugned action has been taken in total violation and breach of the statutory requirement.

That being so, we see no error in the order passed in the writ petition warranting re-consideration as before compulsorily retiring the employee, the requirement of law and the mandatory statutory provision have been violated. As far as the grant of back wages is concerned, this is a case of compulsorily retirement of an employee who after his retirement was receiving pensionary benefit and, therefore, the principle of law governing gainful employment which is applicable only in a case of illegal termination or removal from service will not apply in case of the retirement of a nature which is canvassed before us.

Accordingly, finding no case for interference into the order passed by the learned Writ Court, we dismiss the appeal.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

K.C.Jha/-

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