

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5741 of 2017

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Chandra Bhushan Choudhary Son of Late Ram Bahadur Choudhary, resident of village and P.S. Khirhar, District Madhubani.

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Road Construction Department, Government of Bihar, Patna.
2. Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary, Road Construction Department, Government of Bihar, Patna. I
3. Deputy Director, Training and Research Institute, Road Construction Department, Bihar, Patna.
4. Superintending Engineer, Road Construction Department, Magadh Road Circle, Gaya.

.... Respondents

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Appearance :

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

For the Respondent/s : Mr. Mahtab Alam, AC to SC-20

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 15-09-2017

Heard Mr. Shiv Kumar, learned counsel appearing for the petitioner and Mr. Mahtab Alam, learned AC to SC-20, for the State.

With the consent of the parties the writ petition has been heard with a view to final disposal at the stage of admission itself.

The writ petition was filed praying for issuance of writ in the nature of certiorari for quashing the office order bearing Memo No. 969(E) dated 22.2.2017 issued under the signature of the Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Department, Bihar, impugned at



Annexure 8 to the writ petition, whereby the petitioner has been visited with punishment of compulsory retirement in exercise of powers vested in the disciplinary authority under Rule 14(ix) of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as 'the Rules') as amended from time to time. While the writ petition is pending that the appeal of the petitioner has been rejected by the Principal Secretary vide order bearing Memo No. 5956(5) dated 5.7.2017 by modifying the order of compulsory retirement into an order under Rule 14(vii) of 'the Rules' by bringing the petitioner to a lower pay scale by way of reversion on a permanent basis. A copy of the order has been impugned at Annexure 10 to I.A. No. 5104/2017 and the prayer made by the petitioner to question the same in the present proceeding is allowed.

I.A.No. 5104/2017 is allowed.

The situation is hopeless and I say so because the case in hand is not a case in isolation where the authorities holding the rank of Engineer-in-Chief cum Addl. Commissioner cum Special Secretary in the Department as well as the Principal Secretary of the department are oblivious of the legal position and the statutory prescriptions governing the issue of voluntary retirement. In the nature of dispute engaging this Court, I can only observe that the



State litigation policy has been reduced to a mockery because this Court is flooded with litigation(s) which confirm mechanical discharge.

Facts of the case briefly stated is that the petitioner filed an application for voluntary retirement on 17.4.2015 which is addressed to the Secretary, Road Construction Department and a copy of which is placed at Annexure 1. The application was acted upon when it was forwarded by the Superintending Engineer, Road Construction Department, Magadh Road Circle, Gaya to the Engineer-in-Chief cum Addl. Commissioner cum Special Secretary vide his letter no. 679 dated 23.5.2015, a copy of which is placed at Annexure 2. Until this date or even within three months thereafter, no disciplinary proceeding was either pending or initiated against the petitioner. In fact it is five months after filing of the application of the petitioner seeking voluntary retirement and four months after his application was forwarded by the Superintending Engineer to the respondent Engineer-in-Chief cum Addl. Commissioner cum Special Secretary that the Engineer-in-Chief cum Addl. Commissioner cum Special Secretary vide Memo No. 6195(E) dated 23.9.2015, a copy of which is placed at Annexure 4, has initiated a disciplinary proceeding against the petitioner under Rule 17 of 'the Rules' by enclosing a copy of the charge memo. According to the



petitioner, no enquiry in the manner prescribed under Rule 17 of 'the Rules' was held nor a copy of the enquiry report was served on him nor any second show cause was asked from him as mandated under Rule 18 of 'the Rules' rather straightway he was informed about the order of compulsory retirement passed vide Memo No. 969(E) dated 22.2.2017, impugned at Annexure 8. Feeling aggrieved the petitioner moved the appellate authority i.e. the Secretary of the Department raising all issues but even the Secretary did not bother to either deal with the issue raised by him on the statutory violation nor did he bother to satisfy himself whether any such disciplinary proceeding could be initiated on expiry of three months from filing of an application for voluntary retirement, rather showing compassion he has modified the penalty order into an order of reduction in a lower scale of pay on permanent basis vide order bearing Memo No. 5956(5) dated 5.7.2017, impugned at Annexure 10 to the interlocutory application.

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

Rule 74 of the Bihar Service Code is very clear on the issue and enables the State Government as an employer to retire any employee prematurely as well as the employee to seek voluntary retirement by giving three months prior notice, subject to fulfillment



of condition of qualifying service. There is no dispute that the petitioner has completed qualifying service. The Rule is also very eloquent when it stipulates that on expiry of three months period and in case the Government servant is not placed under suspension, he would be allowed to voluntary retire. There is no dispute that no disciplinary proceeding was either initiated or pending against the petitioner on the date he filed his application for voluntary retirement on 17.4.2015. Although a valiant effort has been made by the State to justify the impugned action by relying upon some show cause notice issued to the petitioner on unauthorized absence but the legal position on the issue is very clear and put to rest in the judgment of the Supreme Court in the case of **Union of India & ors. v. K.V.Jankiraman & ors.**, since reported in (1991)4 SCC 109, that a disciplinary proceeding is said to be initiated only on service of a charge memo as prescribed under 'the Rules' on the delinquent employee and not prior thereto. In other words, no disciplinary proceeding was pending against the petitioner on the date he put his papers seeking voluntary retirement nor he was under suspension.

In such circumstances and in view of the statutory prescriptions underlying Rule 74(b)(i) of 'the Rules' the application of the petitioner seeking voluntary retirement dated 17.4.2015 as



contained in Annexure 1 as forwarded by the Superintending Engineer vide his letter dated 23.5.2015 at Annexure 2 would be deemed to have been accepted on expiry of three months and the petitioner would be deemed to have retired with effect from 17.7.2015 in absence of any order being passed by the State Government. There is absolutely no confusion on the legal position so existing under Rule 74 rather the confusion is prevailing in the minds of the respondent Engineer-in-Chief cum Addl. Commissioner cum Special Secretary and unfortunately also, the Principal Secretary because they have not bothered to even go through the statutory prescriptions and the law so laid down by this Court as early as in 2008. Even if no order was passed on the prayer made by the petitioner on 17.4.2015 but in view of the stipulation present in Rule 74, the petitioner superannuated on expiry of three months thereafter i.e. w.e.f. 17.7.2015. A similar situation came up for consideration before this court in the case of **Dr. Shah Azad Siddiqui v. the State of Bihar & ors.**, reported in 2008(4) PLJR 194, and the opinion expressed by the Bench at paragraphs 9 to 11 would squarely cover the case of the petitioner which runs under:

“9. This Court has already noticed that the request for voluntary retirement was in the year, 1998 when the departmental proceedings are alleged to have been initiated in the year, 2000 long after the expiry of the



three months' notice period. The attempt in the supplementary counter affidavit by the Secretary of the Department to raise a bogey that the petitioner, in fact, never submitted any application for voluntary retirement is nothing but a subterfuge to save their own lapses. It is a matter of common knowledge that when an official representation or communication is received in the Government office it is entered in a diary, given a serial number with the date of receipt. Not having denied the same in the original counter affidavit, it is now urged that the diary itself is not traceable for which also the petitioner cannot be faulted.

10. A bare reading of Section 74(b)(i) of the Bihar Service Code makes it apparent that the option lies with the employee to initiate the process. The only right given to the Government is if the officer is under suspension to deny such option for voluntary retirement and it could also do so by express refusal during the notice period. That this was distinct from the powers of the employer under Rule 74(b)(ii) to terminate the services after three months' previous notice or pay in lieu thereof. That the Government itself has not understood it in any other manner is apparent from the F.D.Memo. No. P.C.-2-9-9/78/6190F dated 27.4.1979 when it provides that the scheme was purely voluntary and for which the Government employee had to come forward. That such an offer could be withdrawn by the employee



within the period of three months.

11. Having considered the facts and circumstances of the case, this Court holds that the petitioner is deemed to have voluntarily retired from service on 30.6.1998. Once the relationship of master and servant ceases, the question of initiating any departmental proceedings against him, therefore, simply does not arise and is a nullity.”

Since the State was yet not ready to correct itself that it invited another judgment of this Court passed after seven years, by another Co-ordinate Bench in the case of **Vijay Kumar & ors. v. the State of Bihar & ors.**, reported in 2015(2) PLJR 625, and the opinion at paragraphs 55, 56 and 59 are sufficient to confirm the gross illegality in the order impugned herein, which runs under:

“55. Scope of Rule 74(b)(i) of the Bihar Service Code has been decided by this Court in C.W.J.C.No. 2900/2007 (Gauri Devi v. the State of Bihar & ors.) as also in the case of Dr. Shah Azad Siddiqui vs. the State of Bihar & ors., reported in 2008(4) PLJR 194, wherein it has been held that the option lies with the employees to initiate the process of voluntary retirement and the only right given to the Government is that if the Officer is under suspension, such option of the employee for voluntary retirement can be denied. It has further been held that the Government could also refuse voluntary retirement only during the notice period of three months, otherwise it would be a deemed retirement on expiry of



three months notice. This Court in fact had taken the aforesaid view in the light of law laid down by the Apex Court in the case of Union of India & ors. vs. Sayed Muzaffar Mir, reported in 1995 Supp.(1) SCC 76, B.J.Shelat vs. State of Gujarat & ors., reported in AIR 1978 SC 1109, State of Haryana & ors. v. S.K.Singhal, reported in (1999)4 SCC 293, Tek Chand vs. Dile Ram, reported in (2001)3 SCC 290 and in the case of P.Lal v. Union of India & ors., reported in (2003)3 SCC 393.

56. As would be apparent from reading of the aforesaid judgments of Apex Court and this Court as well as the clear provision of Rule 74(b)(i) of the Bihar Service Code, there is no option to the State Government to refuse voluntary retirement on any ground except when the Government servant has been placed under suspension. In fact the concept of approval of the State Government comes only where the Government servant is under suspension.

59. A question would arise that if the petitioner's application dated 21.6.2012 was kept pending for fifteen months before its being rejected on 24.9.2013 who is responsible for such delay? Secondly, the paucity of teachers in the Government Medical College being not a ground referable to the provisions of Rule 74(b)(i) of the Bihar Service Code such rejection in fact wholly uncalled for and per se illegal. In the considered opinion of this Court Rule 74(b)(i) of the Bihar Service Code does not brook of any two interpretation and in fact this aspect of the matter stands well settled in the line of



catena of decision of the Apex Court and of this Court as referred above that the provision of voluntary retirement by way of three months notice is automatic and the incumbent cannot be refused the privilege of voluntary retirement save and except when he has been placed under suspension. In fact even pendency of the departmental proceeding and/or audit objection as per Circular of the department quoted above cannot be made a ground in view of the provisions made in Rule 74(b)(i) of the Bihar Service Code.”

It is unfortunate that the Officers of the State Government occupying such high position are not willing to upgrade themselves on the legal position resulting in unwarranted litigation(s).

Mr. Mahtab Alam, learned AC to SC-20, as face saving effort informs that according to the records, a second show cause together with the enquiry report was sent to the petitioner at his residence, however such statement is being contested by Mr. Shiv Kumar, learned counsel for the petitioner, to submit that it never reached and there is nothing on record to support delivery.

For the reasons so discussed and in view of the law so well settled as well as in view of the statutory prescriptions underlying Rule 74(b) of ‘the Rules’ it is only a completion of formality to hold that the order of punishment of compulsory retirement passed by the Engineer-in-Chief cum Addl.



Commissioner cum Special Secretary, impugned at Annexure 8, as modified by the Principal Secretary vide Memo No. 5956(5) dated 5.7.2017, impugned at Annexure 10, are grossly illegal for no proceedings could have been initiated against the petitioner on the expiry of three months period as stipulated under Rule 74 of 'the Rules' because on expiry of three months period i.e. 17.7.2015, the prayer of the petitioner for voluntary retirement would be deemed to have been accepted and the petitioner shall be treated to voluntary retire w.e.f. 17.7.2015.

In result, the order bearing Memo No. 969(E) dated 22.2.2017 issued under the signature of the Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Department, Bihar, impugned at Annexure 8, together with the order bearing Memo No. 5956(5) dated 5.7.2017 passed by the Principal Secretary, Road Construction Department, impugned at Annexure 10, cannot be upheld and are accordingly quashed and set aside.

The writ petition is allowed with the direction to the Engineer-in-Chief cum Additional Commissioner cum Special Secretary, Road Construction Department, Bihar, to give all consequential benefits as found admissible to the petitioner together with his retiral benefits on his voluntary retirement w.e.f. 17.7.2015,



which should be paid within a period of three months from the date of receipt/ production of a copy of this order.

(Jyoti Saran, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	12.10.2017
Transmission Date	NA

