

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8695 of 2014

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1. Sri Ram Pathak s/o late Sukhdeo Pathak R/o village - Pakharpur P.S. Arwal,
Distt Arwal

.... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Building Construction Department, Government of Bihar, Patna.
2. The Superintending Engineer, South Bihar Circle (Building Construction), Patna.
3. The Executive Engineer, Horticulture Division, Building Construction Department, Govt. of Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Braj Kishore Singh Chouhan

For the Respondent/s : Mr Rajeev Shekhar, AC to GA 13

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 17-08-2017

Heard Mr. Braj Kishore Singh Chouhan, learned counsel
for the petitioner and Mr. Rajeev Shekhar learned AC to GA13.

2. The petitioner has filed this writ petition for quashing
the order dated 23.09.2010 as contained in Memo No. 8660 by which
the petitioner has been dismissed from service with effect from
18.01.2007 (Annexure-1).

3. The brief facts which are relevant for the disposal of
this writ petition are that the petitioner was Class-IV employee,
Gardener, in Building Construction Division, South Bihar Circle,
Patna. The petitioner was made accused in Arwal P.S. Case No. 20 of
1985 registered under Section 394 (b) of the Indian Penal Code and



after trial the petitioner was convicted under Section 395 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years. The petitioner preferred Cr. Appeal No. 134 of 2007 against the order of his conviction and sentence and the same is pending before this Court. On account of conviction in a criminal case the petitioner was dismissed from the service. It is also pertinent to point out here that the petitioner against the order of dismissal as contained in Memo No. 8660 Annexure-1 preferred C.W.J.C. No. 11822 of 2011 and this Court vide order dated 21.02.2013 partly allowed the writ petition setting aside the order of dismissal to the extent it was made with retrospective effect.

4. Shri Braj Kishore Singh Chouhan, learned counsel for the petitioner assailed the order of dismissal of the petitioner on the ground that the petitioner has been convicted under Section 395 of the Indian Penal Code and sentenced to undergo RI for seven years but mere conviction of the petitioner for an offence under Section 395 of the Indian Penal Code does not warrant dismissal of the petitioner from service without asking any show cause. Mr. Chauhan, learned counsel for the petitioner further submits that in the earlier writ petition the petitioner had confined his prayer only to the extent that the order of dismissal was retrospective and the same cannot be made with retrospective effect. Now the petitioner has filed this writ petition



to set aside dismissal order made effective from the date of its issuance. It is further submitted that the order of dismissal was passed without asking any show cause therefore the same is bad. Mr. Chauhan heavily placed his reliance on paragraph-29 of the case of **Surya Deo Singh vs. State of Bihar** reported in **2011 (1) PLJR 28** which reads as follows :

29. We may, however, carve out one exception to this proposition. There may be cases where the penalty is imposed under clause (a) of the second proviso to Article 311(2) of the Constitution. Where the person, without enquiry is dismissed, removed or reduced in rank solely on the basis of conviction by a criminal court, the Tribunal may examine the adequacy of the penalty imposed in the light of the conviction and sentence inflicted on the person. If the penalty impugned is apparently unreasonable or uncalled for, having regard to the nature of the criminal charge, the tribunal may step into render substantial justice. The Tribunal may remit the matter to the competent authority for reconsideration or by itself substitute one of the penalties provided under clause (a). This power has been conceded to the court in *Union of India vs. Tulsiram Patel*, AIR 1985 SC 1416.

“Where a disciplinary authority comes to know that a Government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what the penalty should be The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned Government servant. Having decided



*which of these three penalties is required to be imposed, he has to pass the requisite order. A Government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the Government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular Government service the court will also strike down the impugned order. Thus, in *Shankar Das vs. Union of India* (AIR 1985 SC 772) this court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the court should always order reinstatement. The court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case."*

5. On the contrary, learned AC to GA 13 submitted that from perusal of the prayer portion of the writ petition earlier filed by the petitioner being C.W.J.C. No. 11822 of 2011, it would be crystal clear that in this writ petition also the same prayer was made and,



therefore this writ petition is barred by principle of *res judicata*. It is further submitted that order of this court passed in C.W.J.C. No. 11822 of 2011 shows that this Court considered the order of dismissal of the petitioner in its entirety and found that since the order of dismissal was made retrospective and the same is severable from the date of order this Court partly allowed the writ setting aside the part of the order giving effect to the dismissal of the petitioner with retrospective effect.

6. In order to appreciate the rival contention of the parties it is necessary to firstly reproduce paragraph-11 of the order dated 23.09.2010 passed in C.W.J.C. No. 11822 of 2011 which reads as follows:

11. Considering the matter in its entirety, this Court is of the view that the order of dismissal of the petitioner in the given facts and circumstances of the case cannot be held to be illegal, but the other part of the said order giving retrospectivity to the order of dismissal is clearly bad and invalid in view of the principles laid down by the Apex Court in the aforesaid decision.

7. The order passed in earlier writ petition C.W.J.C. No. 11822 of 2011 and the judgment rendered in the case of Surya Deo Singh and on perusal of the contents of the present writ petition, I find no force in the submission of learned counsel for the petitioner that the petitioner was not noticed or he was not asked to show cause. In



paragraph-8 of the present writ petition the petitioner has stated that the petitioner was asked to show cause and only thereafter the disciplinary authority dismissed the petitioner from service on the ground that the petitioner has been convicted in a criminal case. In the case of Surya Deo Singh (supra) on consideration of the provisions of Article 311(II) and the provisions of Rule 20 of the Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 it has been held that in some cases when the conviction and sentence of employee does not involve moral turpitude in course of his official duty, the employee does not deserve extreme punishment of dismissal. In such cases, the disciplinary authority should have asked show cause and testify whether on the basis of such conviction and sentence in a petty case the employee deserves to be inflicted with major punishment such as dismissal.

8. On consideration of the facts aforesaid, I find that judgment rendered in the case of Surya Deo Singh (supra) is of no help to the petitioner as the disciplinary authority asked show cause from the petitioner and the petitioner is convicted in a case of dacoity and not in a case of mutual assault or scuffle or in a case of petty nature. Moreover, I find that this writ petition is also fit to be dismissed on the ground of principle of *res judicata* as the petitioner had earlier filed C.W.J.C. No. 11822 of 2011, in which the petitioner



made same and similar prayer for setting aside the order of his dismissal and the same was partly allowed as illegality was found in the order of dismissal as the same was made effective with retrospective date.

9. Thus, on the basis of discussions made above, I do not find any merit in this writ petition. Accordingly, the same is dismissed.

(Prabhat Kumar Jha, J)

KKSINHA/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	06.09.2017
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