

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.4839 of 2013

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Dr. Ashok Kumar Singh S/O Late Anirudh Prasad Singh R/O 314,
 Patliputra Colony, Police Station- Patliputra Colony, District- Patna

.... **Petitioner**

Versus

1. The State Of Bihar through the Chief Secretary, Government of Bihar, Patna
2. The Principal Secretary, Department of Health (Medical Education), Government of Bihar, Patna
3. The Secretary, Medical Education and Family Welfare, Department of Health, Government of Bihar, Patna
4. The Joint Secretary, Department of Health (Medical Education), Government of Bihar, Patna
5. The Deputy Director, Department of Health (Medical Education), Government of Bihar, Patna
6. The Additional Director, Department of Health (Medical Education), Government of Bihar, Patna

.... **Respondents**

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Appearance :

For the Petitioner/s : Mr. Abhay Kumar Singh, Sr. Advocate
 Mr. Rajesh Singh, Advocate
 For the Respondent/s : Mr. Ashok Kumar Keshari, AAG-11
 Mr. Brajesh Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
CAV ORDER

- 20 16-05-2017 The writ petition initially was filed for the following reliefs:
- (i) For quashing memo No.23(17), dated 08.10.2010
 (Annexure-20 at Page-146) of Health Department, Government of Bihar, by which the petitioner was inflicted punishment of
 censure and stoppage of three increments with cumulative effect in
 a department proceeding;
- (ii) For setting aside the entire departmental proceeding



initiated vide memo No.433 (17), dated 30.5.2007.

Two Interlocutory Applications bearing I.A. No.738 of 2015 and I.A. No.2619 of 2016 were also filed for amendments in the relief:- (i) In I.A. No.738 of 2015, the petitioner has sought quashing/setting aside memo No.26 (17), dated 16.1.2015 (Annexure-23) issued by the Joint Secretary, Department of Health, Government of Bihar by which memo of appeal preferred by the petitioner against the order of punishment contained in memo No.23 (17), dated 8.1.2010 has been dismissed and process for enhancing the punishment has been initiated.

(ii) In I.A. No.2619 of 2016, the petitioner has sought staying further proceedings of Service Appeal filed on 18.2.2010 against the impugned order of punishment as well as stay of operation of letter No.185, dated 16.3.2016 initiating steps for dismissing the petitioner from service by enhancing the punishment.

2. As the allegations date back to over four decades, it would be necessary to notice the facts and case of both the parties in brief.

(a) The petitioner's case is that he was granted study leave for post graduate training in Urology at Christian Medical College, Vellore w.e.f. 14.3.1983 vide letter No.1558 (3), dated 3.10.1983



issued by the Health Department. While he was pursuing his course at Vellore, the post of Professor of Urology became vacant resulting into stoppage of M.Ch. course in super-specialty of Urology. It is further case of the petitioner that in the meanwhile, he got an opportunity to pursue Post Graduate course in Urology abroad and accordingly he filed a representation, dated 22.12.1983, requesting the department to convert his study leave into Ex-India leave. He also made verbal request to the authorities of the department in person but no action was taken on his representation or request. The petitioner went abroad, in anticipation of sanction of his leave. He renewed representations which went unheeded. After returning from abroad, he submitted his joining on 2.3.1988 in the department which was neither rejected nor accepted. In the meantime, the petitioner received a rare offer for doing specialized post graduate course in Urology, Vienna, Austria and he proceeded for the course. After completing his course and obtaining degree in Post Graduate in Urology, he submitted his application before the respondent department in continuation of his earlier representation, dated 2.3.1988, which was still pending for disposal.

(b) The department vide letter No.1567 (3), dated 6.11.1990 sought explanation from the petitioner as to why appropriate



action be not taken against him for leaving the country and his work without permission. The petitioner submitted his show cause reply. It is relevant to state that the petitioner had neither annexed the show cause, dated 6.11.1990 issued by the department nor the explanation submitted to the show cause. Not being satisfied with the explanation of the petitioner, the department awarded punishment of break in service and censure vide memo No.114 (3), dated 7.2.1991 (Annexure-1 at Page-26). The petitioner consequently submitted his joining on 8.2.1991 and was in the office of the Civil Surgeon, Patna on 27.6.1991, who in turn deputed him at Additional Primary Health Centre, Goharpur on 25.9.1991.

(c) According to the petitioner, while he was being considered for promotion to the post of Assistant Professor, Kidney Transplant Unit, Department of Surgery, Patna Medical College, Patna, at the instance of some vested interest, the respondent department vide letter No.40 (17), dated 20.4.1995 again issued a show cause notice seeking explanation for the charge for which was he was already awarded punishment vide notification, dated 7.2.1991. Though, the show cause notice, dated 20.4.1995 has not been annexed, the show cause reply has been annexed by the petitioner at Annexure-2 at Page-27. It is the case



of the petitioner that the department dropped the proceedings and he was granted promotion as Assistant Professor, Kidney Transplant Unit, Department of Surgery, Patna Medical College, Patna vide memo No.248(17), dated 16.9.1995 (Annexure-3, at Page-30).

(d) Again in the year 2005-06, while the petitioner was being considered for promotion as Associate Professor, the present departmental proceeding was initiated on an un-affidavited complaint of one Mr. Arbind Kumar of village Amarpura, after initial formality of preliminary enquiry, vide memo No.433 (17), dated 30.5.2007 (Annexure-7, at Page-47). One Dr. Uma Shankar Prasad Srivastava, Deputy Director, Health Services, Bihar, Patna was appointed as conducting/enquiry officer and Section Officer was appointed as Presenting Officer. The English translation of charge detailed in paragraph 21 of the writ petition is quoted herein below:

- I. Petitioner was sanctioned education leave vide letter no.1558 (3) dated 30.10.1983 for pursuing the post graduate course at C.M.C. Vellore but the petitioner worked as Urologist at Saudi Arabia from 28.12.1983 to 8.9.1989 without the prior approval of the Government.*
- II. The petitioner intentionally disclosed the period of Ex-India Leave from 14.3.1983 to 1.3.1988 in the earlier departmental proceeding whereas the petitioner persued post graduate course at Saudi Arabia from 28.12.1983 to 8.9.1989 and at Vienna from 1.10.1989 to June 1990. As such the petitioner remained on*



unauthorized leave from 28.12.1983 to June, 1990 for the purpose of study as well as for earning.

III. The petitioner in his explanation dated 18.3.2006 had submitted incomplete service history in which period of Ex-India leave has not been mentioned.

IV. The petitioner did not responded to the petitioner direction of Principal P.M.C.H. in response to an enquiry and as such the petitioner has delayed the enquiry by his unsupportive behavior.

(e) In the meantime, the Enquiry Officer superannuated and one Sri Jamiruddin Ansari, Joint Secretary, Department of Health was appointed as Enquiry Officer vide memo No.95 (17), dated 29.1.2008 (Annexure-9, at Page-57). On conclusion of the enquiry, the Enquiry Officer submitted his report, dated 8.12.2008 (Annexure-14, at Page-77) recording a finding of guilt. On receipt of the enquiry report, a show cause was asked by the Joint Secretary (Mr. Jamiruddin Ansari) vide letter No. 148(17), dated 17.3.2009 (Annexure-15, Page-81). The petitioner submitted his tentative reply, dated 23.4.2009 (Annexure-16) and demanded certain papers and information for making an effective reply. The petitioner reiterated his request again vide his representation, dated 18.8.2009 (Annexure-17) for supply of certain paper/information. However, no information was supplied and ultimately the petitioner submitted his explanation on 14.9.2009 (Annexure-18).



(f) Being dissatisfied with the explanation of the petitioner, the government awarded punishment of censure and stoppage of three increments with cumulative effect vide memo No.23 (17), dated 8.1.2010 (Annexure-B to the Counter affidavit/Annexure-20 at Page-148).

(g) Thereafter, the petitioner filed Service Appeal on 18.2.2010 against the order of punishment dated 8.1.2010.

(h) During pending of Service Appeal, the petitioner filed the instant writ application praying therein to set aside the entire departmental proceeding as well as order of punishment, dated 8.1.2010 as contained in Annexure-20 at Page-148. This Court vide order, dated 23.6.2014 directed the respondents to dispose of the appeal within two months.

(i) The Health Department, Government of Bihar by order issued vide memo No. 209(17), dated 18.2.2013 decided to constitute two members committee to examine the appeal of the petitioner. The two members committee agreed that there was no valid ground in appeal and rather recommended to enhance the earlier punishment to one of dismissal from service under Rule 76 B of the Bihar Service Code for remaining on unauthorized absence for seven years. A copy of the report of the Committee dated 27.12.2013 is at Annexure-A at Page-128 of counter



affidavit.

(j) During the consideration of the appeal, the State Government in exercise of power conferred under Rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 decided to enhance the punishment and accordingly issued second show notice to the petitioner vide memo No.686 (17), dated 29.9.2014 (Annexure-B to the counter affidavit). The petitioner replied on 17.10.2014.

3. Now reverting to the relief:-

(i) the petitioner has sought quashing of the order of punishment, dated 8.1.2010 and the entire departmental proceeding as well as stay of further action against him in his Service appeal primarily on the ground that (i) no one should be punished twice for the same charge. Elaborating his submissions, the petitioner submits that the main charge against him is that he went on Ex-India leave without permission from the year 1983 to 1989 for which a proceeding was drawn and was awarded punishment of break in service and censure vide memo No.114(3), dated 7.2.1991.

(ii) Again for the same charge, a show cause was issued vide letter No.40 (17), dated 20.4.1995, the petitioner explained in his reply that he was already punished for the same charge in the year 1991. Being satisfied with the explanation, the proceeding



was dropped and he was granted promotion to the post of Assistant Professor, Kidney Transplant Unit, Department of Surgery, Patna Medical College, Patna vide memo dated 16.9.1995 (Annexure-3).

(iii) Again after ten to twelve years, another departmental proceeding was initiated for unauthorized absence, this time the period from 1.10.1989 to June, 1990 was also included to the earlier period of unauthorized absence from 28.12.1983 to 2.3.1988 or 8.9.1989. The petitioner replied that he has already been punished substantially for the said charge earlier in the year 1991 and a similar proceeding was started in the year 1995 but dropped in view of the fact that he was already punished.

(iv) He states that misconduct merges with the executive order and a fresh proceeding cannot be started on the same charge again and again. In support of his submission, the petitioner has relied upon a decision in the case of **Indian Bank Vs. Official Liquidator, Chemmeens Exports (P) Limited & Ors.**, reported in (1998) 5 SCC 401, para-17 and in the case of **M/S Gojer Bros. (Pvt.) Ltd vs. Shri Ratan Lal Singh**, reported in (1974) 2 SCC 453, at para-26. Further more, the charges are stale and all exercise of powers must be made within a reasonable time. In support of his submissions, the petitioner has relied upon a



decision in the case of *HEC Voluntary Retd. Emps. Welfare Society vs, Heavy Engineering Corporation Ltd & Ors*, reported in *2006(2) PLJR 124 (SC)*.

(v) Besides this, the petitioner assailed the proceeding on the ground that he has not been provided necessary documents for giving effective reply. A copy of preliminary enquiry report was also not supplied. The second show cause has also been issued by Md. Jamiruddin Ansari, the Enquiry Officer (Joint Secretary, Health Department), which is impermissible in law. The formation of two men committee to examine and report on the merit of appeal is unheard of.

4. The case of the respondents in brief is that the petitioner was granted three years study leave vide Health Department's letter No.1558 (2), dated 3.10.1983 w.e.f. 14.3.1983; However, instead of doing Post Graduate training course at C.M.C. Vellore, and without obtaining any permission from the State Government, the petitioner went on foreign tour firstly from 23.12.1983 to 1.3.1988 and then to Vienna, Austria from 1.10.1989 to June, 1990. The petitioner falsely reported the period of his absence from 14.3.1983 to 1.3.1988. The first show cause issued to the petitioner on 6.11.1990 by the Health Department was for his unauthorized absence from 14.3.1983 to 1.3.1988, as the petitioner



has wrongly reported his absence from 14.3.1983 to 1.3.1988 and not for the entire period commencing from 14.3.1983 to 8.9.1989 (for being in Saudi Arabia) and from 1.10.1989 to June, 1990 (in Vienna, Austria). The departmental proceeding initiated vide memo No.433 (17), dated 30.5.2007 was thus not for the same charge, for which he was proceeded earlier in 1990-91 and punished. It was next submitted that the second show cause notice was not issued by the Enquiry Officer, but by the Government and the Enquiry Officer, who was holding the post of Joint Secretary in Health Department, was merely communicating the order of the Government. It was also submitted that the Government has got power under Rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 to confirm, enhance, reduce or set aside the penalty and as such the government is considering to enhance the punishment.

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

6. The following issues arise for consideration in this case is:

(i) Whether the charge for which the petitioner was proceeded on 06.11.1990 and punished and the charge for which he was proceeded on 30.05.2007 are identical, as claimed by the petitioner?

(ii) If the charge is not identical, whether it is permissible



for the government to frame charge in piecemeal ranging over 16-17 years when it could have done the same on 06.11.1990, when the petitioner was first proceeded in the matter, as misconduct all of the period, prior 6.11.1990?

(iii) Whether the Government can exercise the power of enhancement of punishment under Rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 after delay of 5-7 years?

(iv) Whether the proceeding otherwise suffers from unreasonableness and denial of reasonable opportunity to defend him?

7. Now having framed the issues arising in this case, I will deal the issue one by one.

Issue No.1:

Whether the charge for which the petitioner was proceeded on 06.11.1990 and punished and the charge for which he was proceeded on 30.05.2007 are identical, as claimed by the petitioner?

It is evident from the materials on record that the proceeding started on 06.11.1990 and the other on 30.05.2007, was both for unauthorized absence from the country. Whereas, the first proceeding, dated 6.11.1990 was for the period 14.3.1983 to 1.3.1988 when the petitioner had proceeded abroad. The second



proceeding, dated 30.5.2007 was for different period starting from 1.10.1989 to June, 1990, when the petitioner left for Vienna, Austria, for pursuing P.G. Course in Urology. As such, I am of the considered view that the charge against the petitioner is not identical as it relates to two different distinct period of unauthorized leave.

Issue No.2:

(ii) If the charge is not identical, whether it is permissible for the government to frame charge in piecemeal ranging over 16-17 years, when it could have done the same on 6.11.1990 when the petitioner was first proceeded in the matter as misconduct is immediately prior to the period 6.11.1990?

8. As noticed in the preceding paragraph, the petitioner went abroad on unauthorized leave in two phases. The first time from 14.3.1983 to 1.3.1988/8.9.1989 and the second time from 1.10.1989 to June, 1990. The charge of misconduct is all prior to the period 6.11.1990, when the petitioner was first proceeded for charge of unauthorized absence. However, for reasons best known to the respondents, they proceeded against the petitioner for unauthorized absence on 6.11.1990 only up to the period from 14.3.1983 to 1.3.1988/8.9.1989. The respondents ought to have proceeded for the entire period of unauthorized absence when the



first proceeding was started on 6.11.1990.

9. The respondents' explanation is that they were misled by the representation of the petitioner.

10. In my view, the excuse tendered by the respondents is unacceptable, as they are the custodian of service record and cannot shift the blame on the employee that the latter had not correctly given the details of his unauthorized absence. Furthermore, it is equally intriguing that it took the department 17 long years to discover the period of unauthorized absence. It would be rather assumed that after knowing the misconduct, the master condoned the mistake and permitted him not only to continue in service, but also granted him promotion in 1995 to the post of Assistant Professor, Kidney Transplant Unit, Department of Surgery, P.M.C.H., vide Memo dated 16.09.1995 (Annexure-3). On this ground itself, the proceeding initiated on 30.05.2007 was liable to be quashed, being stale and impermissible being hit by Doctrine of Condonation. The Hon'ble Apex Court in case *of State of Madhya Pradesh and Ors Vs. R.N. Mishra and Ors*, reported in *AIR 1997 Supreme Court 3548*, observed as follows:

“4. Before we advert to the argument of the learned counsel for the appellant, it may be seen as to what is the doctrine of condonation of misconduct under the ordinary law of Master and Servant. Under ordinary law of Master and Servant, an employer has option to punish an erring employee on the



ground of misconduct committed by him, but the employer if voluntarily elects not to take any action to punish the delinquent officer, then it would be a case of Condonation of Misconduct by the master. In Labor and Labor Relations [48 Am Jr 2d 636]- it is stated thus:

"636.- Condonation of misconduct.

The doctrine of condonation prohibits an employer from misleadingly agreeing to return his employees to work and then taking disciplinary action for something apparently forgiven. (Packers Hide Asso. v. NLRB (CA8) 360 F2d 59). Condonation can be found, however, only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee for his misconduct and has agreed to a resumption of the employer-employee relationship as though no misconduct had occurred. [Packers Hide Asso. v. NLRB (supra)]."

In L. W. Middleton v. Harry Playfair, AIR 1925 Cal 87 at p. 88, it was held thus :

"If a master on discovering that his servant has been guilty of misconduct which would justify a dismissal, yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned."

However, in the facts of the case, I refrain from doing so, as the petitioner did not challenge the initiation of proceeding in the Court in the year 2007 itself or soon thereafter. The petitioner once having submitted himself to the proceeding and having taken his chance would be precluded from challenging the same belatedly in the year 2013, after the award of punishment on 8.10.2010. In such circumstance, this Court is not inclined to



quash the departmental proceeded initiated vide notification, dated 30.5.2007.

11. This takes me to other issue whether the Government can exercise the power of enhancement of punishment under Rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 after a prolong delay of 5-7 years.

12. In the instant case, the punishment order was passed on 8.10.2010 vide memo No. 23(17), dated 8.10.2010 (Annexure-20, Page 146). The petitioner preferred a Service Appeal against the impugned order of punishment. More than after three years of passing of the order of punishment, the respondents initiated process under Rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 for enhancement of the punishment. No final order of enhancement of punishment has been brought on record. It is true that rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 empowers the government to confirm, enhance, reduce or set aside the penalty and the provision does not prescribe any time limit, but this does not mean that the government can exercise this power as per whims and fancies. Such power has to be exercised within a reasonable period.

In case of *Anjan Kumar Singh Vs. State of Bihar & Ors.*, reported in 2001 (4) PLJR 177, a learned Single Judge while



considering Rule 853A (a) of the Bihar Police Manual, 1978, which authorized the I.G.P. to *suo motu* call the file in any case and pass such order as he may deem fit, even when no appeal lies, observed that even though no time limit was prescribed, such exercise of power after delay of 3 years was unreasonable and, accordingly, quashed it.

In my view, the exercise of power under rule 27(2)(i)(c) of the Bihar Servants (CCA) Rules, 2005 after inordinate delay of 3 years would too be arbitrary and unreasonable and is, accordingly, quashed.

13. Now, I come to the final aspect of the matter whether the departmental proceeding against the petitioner suffers from any ground of unreasonableness and non-compliance of principles of natural justice. The petitioner, herein, has contended that he was not provided necessary documents and even copy of preliminary enquiry was also not made available, thus, depriving him from making an effective representation to meet and rebut the allegations and charges. I find that no reason has been provided as to why the documents are not being supplied or that the documents sought are irrelevant. Besides this, the impugned order of punishment is non-speaking order as it has not met and addressed the grounds taken by him in his second show cause. Reference can



be made to a decision in the case of ***Government of A.P. Vs. A.V. Razdan, reported in (2007) 1 SCC 338*** and in the case of ***Union of India Vs. S. K. Kapoor, reported in (2011) 4 SCC 589, para-5.***

14. As such, I am of the considered view that the petitioner was deprived of a reasonable opportunity to rebut the charges and defend himself effectively in the departmental proceeding and thus the action was arbitrary and violative of principles of natural justice.

15. In the result, the impugned order of punishment, dated 08.10.2009, as contained in memo No.23(17) (Annexure-20), is set aside with liberty to the respondents, if so advised, to proceed from the stage of supplying the documents or at least allowing him inspection of the same.

16. The writ application is allowed to the extent mentioned above.

(Samarendra Pratap Singh, J.)

Md. Jamaluddin Khan

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