

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6035 of 1997

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- 1(i) Most. Usha Choudhary, Widow of Late Ram Bilas Choudhary (the original petitioner).
1(ii) Alka Kumari, Daughter of Late Ram Bilas Choudhary (the original petitioner).
1(iii) Shilpa Kumari, Daughter of late Ram Bilas Choudhary
All are residents of Village- Panchobha, P.S. & P.O- Panchobh, District-Darbhhanga.

.... Petitioner/s

Versus

1. The Union of India.
2. Director, C.I.S.F., New Delhi
3. Commandant, C.I.S.F., Bailey Road, P.O. Danapur Cantt, Patna.
4. Assistant Commandant, C.I.S.F., T.H.D.C., Tehri.

.... Respondent/s

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Appearance :

For the Petitioner/s : Ms. Surya Nilambari, Adv.
Mr. Durga Nand Jha, Adv.
For the Respondent/s : Mr. Anjani Kumar Sharan, ASG.
Mr. Ravinder Kumar Sharma, CGC.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 02-08-2018

The writ petition under Article 226 of the Constitution of India has been filed praying for issuance of a writ in the nature of Certiorari for quashing the punishment order dated 30.03.1996 passed by the Disciplinary Authority -cum- Commandant, C.I.S.F. whereby the writ petitioner who has since deceased was dismissed from service. A copy of the order is impugned at Annexure 6 to the writ petition and has been affirmed by the Appellate Authority who vide order passed on 12.08.1996 impugned at Annexure-9 has dismissed the appeal and even the revision application has followed the suit when it was dismissed by the Revisional Authority vide order passed on 10.05.1997 impugned at Annexure-10.



The writ petition was admitted for hearing on 17.11.1997. While the matter remained pending for hearing that the writ petitioner deceased and has been substituted by his legal heirs vide order passed on 28.07.2003. The legal heirs have chosen to pursue the cause.

The facts accompanying the present case lie in a very narrow compass. The deceased petitioner was served with a charge memo dated 16.03.1995 alleging 8 acts of misconduct mostly relatable to the alleged offensive behaviour of the deceased petitioner towards the superiors as well his own family members. While according to the respondents, despite notice of participation in the inquiry, the petitioner avoided to cooperate, the charge is being contested by learned counsel for the petitioner to submit that the petitioner had no information about the inquiry.

Be that as it may, the inquiry was held, the report of which is enclosed at Annexure 2 and is dated 28.07.1995. The Inquiry Officer has upheld the charges. According to the respondents, a second show cause was issued to the deceased writ petitioner together with the enquiry report seeking his representation but he chose to avoid its receipt.

While Mr. Anjani Kumar Sharan, learned Assistant Solicitor General has relied upon the notice dated 18.07.1995 enclosed at Annexure 'B' to the counter affidavit of the respondents in support of the contention that the petitioner was informed about



the inquiry and also relies upon the signature present on the notice, the submission has been contested by Ms. Surya Nilambari, learned counsel appearing for the petitioners to submit that whereas vide order dated 8.7.1995 at Annexure 5 the petitioner was already transferred to Rishikesh, this notice was addressed to the Tihri address of the petitioner and the signature does not belong to him.

Be that as it may, the fact remains that the petitioner did not file any reply to the inquiry report which has resulted in the order of dismissal dated 30.03.1996 impugned at Annexure 6 and which has been affirmed by the Appellate Authority as well as the Revisional Authority vide orders impugned at Annexures 9 and 10 respectively. Feeling aggrieved the original writ petitioner came before this Court but has deceased and as discussed above, his cause is being espoused by his legal heirs.

I have heard Ms. Surya Nilambari, learned counsel appearing for the petitioner and Mr. Anjani Kumar Sharan, learned Assistant Solicitor General on the merits of the contest and having noted the rival submissions affecting the merits of the contest, this Court took notice of certain issues so raised by learned counsel for the petitioner which went to the root of the matter.

The issue so raised by learned counsel for the petitioner stands noted in the order passed on 08.02.2018 by this Court and for the sake of convenience, I deem it necessary to reproduce the extract of the same hereinbelow:



- “(a) Whether it was mandatory for the disciplinary authority to appoint a Presenting Officer to lead the case on behalf of the Department before the Enquiry Officer.
- (b) Whether non appointment of the Presenting Officer has invalidated the entire disciplinary proceedings as in his absence, none could have led evidence against the petitioner.
- (c) Whether in absence of any such provision, the Enquiry Officer himself could have taken up this duty which fell on the department.
- (d) Whether the Enquiry Officer can become a prosecutor or spokesman for the Department.
- (e) Whether the enquiry report was served upon the petitioner together with second show cause as stated in paragraph 27 of the counter affidavit but which is not supported with any documentary proof.

These issues become relevant because the petitioner has deceased and thus if there is a procedural infirmity in the disciplinary proceedings then it would go to the root of the matter for in absence of the delinquent, a re-enquiry obviously cannot take place.

The issues noted would require a perusal of the records which was directed to be produced by a coordinate bench as per order passed on 06.12.2013 as well to consider the CISF Rules, 2001 as it was originally in force because the copy of the rules so produced does contain a mandatory requirement of appointment of Presenting Officer at Rule 36 (6) (v) but this is an amendment incorporated under G.S.R.462 (E) dated 23.5.2003.

As prayed by Mr. Anjani Kumar Sharan, learned Assistant Solicitor General and to enable him to do the needful, put up this case on 22.02.2018. It is made clear that the failure on the part of the respondents to clarify the position with the aid of the relevant rules or the records would act prejudice to the interest for this court is not going to grant any further adjournment considering that the obligation was already cast on the respondents to be in possession of the records as back as in 2013 and that this matter is pending since last 2 decades.”

Learned counsel in support of the issues so raised had relied



upon a judgment of the Gauhati High Court rendered in the case of **Mutum Shantikumar Singh Vs Union of India** reported in **2005 (3) GLR 243**, whereby it is taking note of similar issues raised that the Bench held that non-appointment of Presenting Officer would infract the disciplinary proceeding and render it illegal. The matter travelled up to the Supreme Court in SLP (Civil) No.7363 of 2011 which was registered as Civil Appeal No.2607 of 2012 at the instance of the Union of India. The order of the High Court was not interfered with though the Supreme Court reserved its opinion on the necessity of appointment of the Presenting Officer for the time being.

These aspects were taken note of by this Court in the subsequent orders passed in the present proceedings which was kept pending awaiting disposal of the appeal of the Union of India in the case of **Mutum Shantikumar Singh** (supra).

Today when this matter is taken up for consideration on disposal of the appeal preferred by the Union of India in the case of **Mutum Shantikumar Singh** (supra) by the Supreme Court, Mr. Sharan, learned Assistant Solicitor General being fair on his submission, has informed that even though the Supreme Court while not interfering with the order of the High Court in the case of **Mutum Shantikumar Singh** (supra) reserved its opinion on the issue of necessity of appointment of Presenting Officer but in another case raising identical issue, arising from Civil Appeal



No.2608 of 2012 (**Union of India vs. Ram Lakhan Sharma**), the Bench taking note of the order passed in the case of **Mutum Shantikumar Singh** (supra), has upheld the necessity of appointment of the Presenting Officer in a disciplinary proceeding for in the opinion of the Bench, a non-appointment of Presenting Officer would lead to a bias, infracting the proceedings.

Mr. Sharan has been fair in inviting the attention to the opinion expressed by the Supreme Court at paragraph 35 and 36 of the judgment which in fact would conclude the issue in favour of the deceased writ petitioner because there is no dispute that even in the present case there was no appointment of the Presenting Officer.

The extract of the order passed by this Court on 08.02.2018 would confirm that this Court had taken note of the provisions of the C.I.S.F Rules, 2001 (hereinafter referred to as the 'Rules of 2001') which in its unamended form did not provide for appointment of the Presenting Officer but an amendment to such effect was incorporated vide GSR 462(E) dated 23/5/2003. Meaning thereby the Central Government appreciated the necessity of appointment of a Presenting Officer in a disciplinary proceeding and accordingly the amendment was made in the 'Rules of 2001' with effect from 23.05.2003 but prior thereto there was no such stipulation.

In the present case the impugned orders passed, are of the period prior to the amendment. Perhaps this is why this writ petition was admitted on 17.11.1997 and it has taken more than 20 years for



its final hearing and disposal but perhaps the delay has enured to the benefit of the deceased petitioner because the opinion of the Supreme Court on the issue taken note of above, goes to support the issue advocated by learned counsel appearing on behalf of the petitioner and as I have observed above, paragraph 35 onwards of the judgment is conclusive on the contest.

The issue relating to appointment of the Presenting Officer finds discussed in paragraphs 31 and 32 which takes note of the opinion of the Division Bench of the High Court and paragraph 35 and 36 records the opinion of the Supreme Court. I am persuaded to reproduce the said paragraphs hereinbelow for ready reference:

“31. The Division Bench further held that where the Inquiry Officer acts as Presenting Officer, bias can be presumed. In paragraph 9 is as follows:

“9. A domestic inquiry must be held by an unbiased person who is unconnected with the incident so that he can be impartial and objective in deciding the subject matters of inquiry. He should have an open mind till the inquiry is completed and should neither act with bias nor give an impression of bias. Where the Inquiry Officer acts as the Presenting Officer, bias can be presumed. At all events, it clearly gives an impression of bias. An Inquiry Officer is in position of a Judge or Adjudicator. The Presenting Officer is in the position of a Prosecutor. If the Inquiry Officer acts as a Presenting Officer, then it would amount to Judge acting as the prosecutor. When the Inquiry Officer conducts the examination-in-chief of the prosecution witnesses and leads them through the facts so as to present the case of the disciplinary authority against the employee or cross-examines the delinquent employee or his witnesses to establish the case of the employer/disciplinary authority evidently, the Inquiry Officer cannot be said to have an open mind. The very fact that he presents the case of the



employer and supports the case of the employer is sufficient to hold that the Inquiry Officer does not have an open mind.”

32. The Division Bench after elaborately considering the issue summarized the principles in paragraph 16 which is to the following effect:

“16. We may summarise the principles thus:

(i) The Inquiry Officer, who is in the position of a Judge shall not act as a Presenting Officer, who is in the position of a prosecutor.

(ii) It is not necessary for the Disciplinary Authority to appoint a Presenting Officer in each and every inquiry. Non-appointment of a Presenting Officer, by itself will not vitiate the inquiry.

(iii) The Inquiry Officer, with a view to arrive at the truth or to obtain clarifications, can put questions to the prosecution witnesses as also the defence witnesses. In the absence of a Presenting Officer, if the Inquiry Officer puts any questions to the prosecution witnesses to elicit the facts, he should thereafter permit the delinquent employee to cross-examine such witnesses on those clarifications.

(iv) If the Inquiry Officer conducts a regular examination-in-chief by leading the prosecution witnesses through the prosecution cases, or puts leading questions to the departmental witnesses pregnant with answers, or cross-examines the defence witnesses or puts suggestive questions to establish the prosecution case employee, the Inquiry Officer acts as prosecutor thereby vitiating the inquiry.

(v) As absence of a Presenting Officer by itself will not vitiate the inquiry and it is recognized that the Inquiry Officer can put questions to any or all witnesses to elicit the truth, the question whether an Inquiry Officer acted as a Presenting Officer, will have to be decided with reference to the manner in which the evidence is let in and recorded in the inquiry.

Whether an Inquiry Officer has merely acted only as an Inquiry Officer or has also acted as a Presenting Officer depends on the facts of each case. To avoid any allegations of bias and running the risk of inquiry being declared as illegal and vitiated, the present trend appears to be to invariably appoint Presenting Offices, except in simple cases. Be that as it may.”

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35. Thus, the question as to whether Inquiry Officer who is supposed to act independently in an inquiry has acted as prosecutor or not is a question of fact which has to be decided on the facts and proceedings of particular case. In the present case we have noticed that the High Court had summoned the entire inquiry proceedings and after perusing the proceedings the High Court came to the conclusion that Inquiry Officer himself led the examination in chief of the prosecution witness by putting questions. The High Court further held that the Inquiry Officer acted himself as prosecutor and Judge in the said disciplinary enquiry. The above conclusion of the High Court has already been noticed from paragraphs 9 and 10 of the judgment of the High Court giving rise to Civil Appeal No.2608 of 2012.

The High Court having come to the conclusion that Inquiry Officer has acted as prosecutor also, the capacity of independent adjudicator was lost which adversely affecting his independent role of adjudicator. In the circumstances, the principle of bias shall come into play and the High Court was right in setting aside the dismissal orders by giving liberty to the appellants to proceed with inquiry afresh. We make it clear that our observations as made above are in the facts of the present cases.”

There is no contest on the issue that no Presenting Officer was appointed for the proceeding rather it is the Inquiry Officer himself who has acted as the prosecutor as well as the adjudicator.

In view of the legal position settled, the opinion of the Enquiry Officer in upholding the charge through his report at Annexure-2 suffers bias and thus cannot be upheld. It is an obvious consequence that since the impugned orders are resting on such biased enquiry report, it has to bear the consequences.

In result, the entire proceedings beginning from the stage of submission of the inquiry report at Annexure 2 together with the



second show cause and the order of dismissal impugned at Annexure-6 as well as the appellate and the revisional order impugned at Annexure-9 and Annexure-10 respectively, cannot be upheld for they are founded on a void inquiry report which was clothed with bias. Accordingly the inquiry report at Annexure-2 together with the dismissal order dated 30.3.1996 impugned at Annexure-6, the appellate order dated 12.08.1996 at Annexure 9 and the revisional order dated 10.05.1997 at Annexure-10 cannot be upheld and are accordingly set aside.

The issue now arises is what happens next because the delinquent is dead. In normal course the matter would require a remand to the Inquiry Officer for proceeding afresh and submission of his report in accordance with law but with the death of the delinquent this cannot happen.

An identical situation fell for consideration in a matter arising from **LPA No.1582 of 2015 (The Director, Department of Agriculture Vs Kumkum Devi)**. A Division Bench of which I was a member, taking note of the situation at paragraph 9 and the legal position settled in this regard, has held that in such a situation the proceedings would abate. The discussion present in the judgment at paragraph 9 onwards would apply on all fours, to the issue in contest and for holding that the entire proceedings would stand abated by the death of the delinquent. For ready reference paragraphs 9 onwards is quoted hereinbelow:



“9. The issue is what is the legal consequences of a quashment of an order of penalty of dismissal followed by a remand of the matter to the disciplinary authority for fresh disposal in accordance with law but before the proceedings attain finality, the delinquent deceases in harness.

10. The legal position, in this regard, is well settled and where a disciplinary proceeding remains inconclusive until the death of the delinquent it shall be held abated because obviously it cannot proceed in his absence. Same is the situation where a final order passed in the disciplinary proceeding is quashed by a competent forum and the matter is remitted back to the disciplinary authority for proceeding afresh in the matter in accordance with law, but the liberty so granted is not exercised by the disciplinary authority until the death of the delinquent in harness.

11. The proposition so formulated is no more *res integra* and reference, in this regard, is made to the opinion expressed by the Supreme Court in similar circumstances arising in an appointment matter in a judgment reported in (1998) 8 SCC 194 (**Basudeo Tiwary vs. Sido Kanhu University & Ors**), more particularly to the opinion expressed in paragraphs 13 and 14 of the judgment which runs as under:-

“13. Admittedly in this case, notice has not been given to the appellant before holding that his appointment is irregular or unauthorized and ordering termination of his service. Hence the impugned order terminating the services of the appellant cannot be sustained.

14. The appellant has since demised during the pendency of these proceedings, no further direction either as to further inquiry or reinstatement can be given. We declare that the termination of the appellant by the respondent as per the notification referred to by us is invalid. Consequently, it would be deemed that the appellant had died in harness. Needless to say that the appellant would become entitle to the payment of arrears of salary from the date of termination of his services up to the date of his death on the basis of the last pay drawn by him. Let the respondent take action within a period of three months from today to work out the arrears due to the appellant from the date of his termination till his death and pay the same to his legal representatives.”



(Emphasis supplied)

12. In fact, in a somewhat similar situation as questioned before us in this appeal, fell for consideration before a Bench of this Court in the case of **Ashok Kumar Singh vs. Bihar Industrial and Technical Consultancy Organization Limited and others**, reported in **2000(4) PLJR 471**. In almost identical circumstance where the disciplinary proceeding suffered serious procedural deficiency warranting a remand for holding the proceeding afresh, the Court noticed that the delinquent had deceased in the meanwhile and thus no order could be passed for remand but at the same time, the legal representative had become entitled for the consequential benefits on the death of the employee who was treated to have died in harness. It is taking note of these special circumstance that order was issued to the respondents to make payment of the admissible dues to the legal representative. We are persuaded to reproduce paragraph 5 to 8 of the judgment, in the case of **Ashok Kumar Singh** (supra), which runs as under:-

“5. It is submitted by the learned counsel for the petitioner that the impugned order of dismissal is vitiated on account of fact that the petitioner was denied of subsistence allowance during the inquiry and that the order of dismissal was passed by the authority who was himself the appellate authority under the Regulation of the Company. In this regard, he referred to the judgment of this Court against the same Company filed by one Apurba Kumar Chanda being C.W.J.C. No.3468 of 1995 disposed of on 17.9.1999. It has been submitted that in view of the law settled by the apex Court in the case of **State of Maharashtra v. Chandrabhan and analogous cases**, reported in **AIR 1983 SC 803**, and in the case of **Fakirbhai Fulabhai Solanki vs. Presiding Officer and Anr.**, reported in **AIR 1986 SC 1168**, denial of subsistence allowance during the inquiry has been held to be amounting to violation of the principles of natural justice and consequently vitiates the whole proceedings. He also submitted that this Court in the case of **Rama Kant Sharma v. The Patliputra Central Cooperative Bank and Ors.** relying upon the decision of the apex Court in the case of **Surjit Ghosh vs. Chairman and Managing Director United**



Commercial Bank and Ors., reported in (1995)2 SCC 474, held that where there is provision of appeal against the order of disciplinary authority and the appellate or higher authority against whose order there is no appeal, exercise the power, such order shall vitiate. In view of the settled law, learned Counsel for the Respondents has not been able to defend the order of punishment.

Writ petition is, thus, allowed. The impugned order contained in Annexure 33 is quashed.

6. However, a question arose as to for what relief the petitioner is entitled in the peculiar facts and circumstances of the case. It was submitted by the learned counsel for the Respondent-Company that since the order of punishment has been quashed on technical ground in view of the settled principle such matter are normally remitted back for fresh consideration, but in the present case since the delinquent employee is dead the question of remitting the matter back to the competent authority may not be possible, but at the same time the order having been quashed on technical ground, substituted petitioner cannot be granted any relief. This Court is unable to accept the said submission of the learned Counsel for the Company.

7. In this regard, learned Counsel for the petitioner has relied on the decision of this Court in the case of **Sumitra Devi v. Union of India**, reported in 1987 PLJR 714, wherein under more or less similar circumstances, this Court quashed the order removing the original petitioner from service as being devoid and inoperative in law and further directed the Railway to pay to the legal representatives all salaries due to the employee concerned as if he continued in service till the date of his death and directed to pay them also oilier benefits admissible to the employee concerned including pension, etc. It has been submitted by the learned Counsel for the petitioner that after the order of punishment goes and in the peculiar facts and circumstances, the matter cannot be remitted back to the disciplinary authority, the position as it stood before the order of



punishment was passed stood restored and consequently, the heirs and legal representative of the deceased employee will be entitled for all the benefits.

8. This Court finds substance in the said submission of the learned Counsel for the petitioner. Having regard to the fact that the order of punishment against the deceased employee does not exist and after his death no fresh inquiry can be held and order can be passed the position will stand revived as it stood before the order of punishment was passed. As such, this Court does not find any justification to deny the consequential benefit which view also stands supported by the aforementioned decision of this Court in the case of **Sumitra Devi v. Union of India**".

13. Such a situation also arose in a matter which fell for consideration before a Division Bench of this Court in case of **Union of India vs. Shri Gupteshwar Mishra**, reported in **2015 (3) BBCJ V-156**. The Division Bench, taking note of the procedural flaw in the proceeding and noticing the perversity in the final order passed, was satisfied that the matter required a remand but such order could not be passed since the delinquent was dead. The Division Bench taking note of the circumstances/situation, held the proceeding abated which obviously could not proceed in absence of the delinquent. The opinion expressed in paragraphs 5 and 6 of the judgment would be a guidance to the issue in contest herein and is reproduced hereunder:-

"5. Having considered the matter, in our view, the order of the Tribunal holding that there was serious flaw in the proceedings by non-examination of the Accountant General and the Deputy Accountant General cannot be said to be bad or perverse in any manner. However, even if we set aside the order of the Tribunal that would have necessitated remanding the matter to the Tribunal for fresh consideration or fresh enquiry which obviously cannot be done as the employee is dead. In our view, this writ petition would abate as has been held by the Apex Court in the case of **Basudeo Tiwary Vs. Sidho Kanhu University and others** since reported in **(1998) 8 Supreme Court Cases 194**. As held in that case, it would be deemed that the employee died in harness. We also supported by a decision of this



Court in the case of **Ashok Kumar Singh vs. Bihar Industrial and Technical Consultancy Organization Limited and others** since reported in **2000(4) PLJR 472**, there is yet another decision of this Court in the case of **Mohal Lall Vs. the State of Bihar** being **C.W.J.C. No.9636 of 2008** disposed of on 08.08.2013 wherein again it was held that the employee would be deemed to have died in harness in such a situation.

6. Accordingly, we hold that this writ petition abates and the consequence being that the order of the Tribunal being for reinstatement of the employee, he would be deemed to have died in harness and necessary consequence would automatically flow with regard to death-cum-retiral dues and payment of salary etc.”

Applying the legal principles so settled to the case in hand, it is an obvious consequence that by the quashment of the dismissal order, the deceased delinquent stands reinstated to his post from the date of his dismissal but since he has expired on 29.08.2002, he would be treated to have died in harness and consequentially the disciplinary proceedings so initiated, shall be held abated.

Appreciating the legal position, Mr. Sharan in a last ditch attempt to preempt any claim of the petitioner towards back wages, has relied upon an order of the Division Bench passed in **LPA No.1583 of 2016 (The Union of India vs. Shakuntala Devi)** to canvass that since the delinquent has not served, on the principles of ‘No work no pay’, he should not be allowed any back wages. He submits that this submission was upheld by the Division Bench while considering a similar claim in the case of **Shakuntala Devi** (supra).

I can well appreciate the concern of Mr. Sharan to oppose



the claim of backwages but unfortunately the circumstances arising in the case of **Shakuntala Devi** (supra) is much different from the one existing in the present case. While in the case of **Shakuntala Devi** (supra) the deceased was an absconder and faced charges for such offence, in so far as the present case is concerned, it is the alleged violent behaviour of the delinquent which was a subject-matter of inquiry and not any act of an absconder.

In fact, the legal position is well settled and a pendency of the matter before a Court for more than two decades until its final hearing, cannot act prejudice to the claim of the petitioner for the delayed disposal certainly, is not attributable to him. The issue of backwages as a consequence of reinstatement, has been a subject-matter of a number of proceedings and the opinion of the Supreme Court in the case reported in **2013 SCC 324 (Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya)**, paragraph 21 and 22 upholds the rights of a delinquent on such reinstatement and would apply to the present case as well.

In view of the legal position so discussed, the legal heirs pursuing the cause advanced by the deceased delinquent would be entitled to the backwages with effect from the date of dismissal i.e. 30.03.1996 until 29.08.2002 and whereafter the legal heirs would be entitled to the terminal benefits including family pension as well as other consequential benefits to which the legal heirs of the deceased government servant is found entitled in law.



Let the concerned respondent(s) take expeditious steps for calculation of the in service and terminal benefits including backwages, to which the legal heirs are found entitled and make payment of the same, which exercise be completed within four months from the date of receipt/production of a copy of this judgment.

The writ application is allowed with the direction aforementioned.

No order as to costs

(Jyoti Saran, J)

SKPathak/Anjula

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	25-08-2018
Transmission Date	NA

