

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23800 of 2012

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Pramod Kumar Prasad S/O Sri Baijantri Prasad Sinha R/O Village- Basantpur, P.S.-
Muffasil, District- Bhojpur, Presently Residing At Flat No. 301, Hope Apartment,
Anandpuri, West Boring Canal Road, P.S. Sri Krishna Puri, District- Patna

.... Petitioner/s

Versus

1. The State Of Bihar through the Principal Secretary, Education Department,
Government of Bihar, Patna.
2. The Principal Secretary To The Governor And Honorary Secretary Bihar State
Council For Child Welfare, Raj Bhawan, Patna
3. The Administrative Officer Bihar State Council For Child Welfare, Raj
Bhawan, Patna
4. The Special Officer On Duty And Administrator Bihar State Council For Child
Welfare, Raj Bhawan, Patna
5. The Principal, Anganwadi Training Centre, Bindwara Morh, Munger

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prashant Sinha, Adv.
Mr. Bava Jha, Adv.
Mr. Rohan Verma, Adv.
Mrs. Ruchi Mandal, Adv.
For the State & B.S.C.C.W. : Mr S. Rahman, AC to GP-24

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 08-01-2018

Heard learned counsel for the petitioner and counsel for the
State.

In this case, the petitioner is challenging the order dated
1.10.2012 passed by the Principal Secretary to the Governor-cum-
Honorary Secretary, Bihar State Council for Child Welfare, whereby
and whereunder, his second show-cause was not found satisfactory,
the same was rejected and terminated the services of the petitioner
from 1.10.2012.



The petitioner was appointed as an Accounts Clerk at Anganbari Training Center, Ishakchak, Bhagalpur on 2.6.1987. After joining, he started his duty on and from 6.6.1987. The petitioner took casual leave for 7.10.1997 to 14.10.1997, while he was on casual leave, he had fallen ill and continued on leave even after the period of casual leave as he applied for extending the casual leave on 15.10.1997 from 14.10.1997 to 31.10.1997. The petitioner again remained absent from 1.11.1997 to 25.11.1997. For that period, the petitioner had filed application for extension of leave on 22.11.1997 but, the permission or rejection was not communicated. Later on he has joined the service on 26.11.1997.

Admittedly the petitioner remained unauthorized leave from 1.11.1997 to 21.11.1997 though he had filed an application on 22.11.1997 which was neither rejected nor allowed. The petitioner joined the service on 26.11.1997. The petitioner filed an application for medical leave on 8.12.1997 from 9.12.1997 to 14.2.1998. The same thing happened, neither the leave application was rejected nor allowed and, after completion of a period of his leave, he joined the service on 17.2.1998 and discharged the duty as an Accounts Clerk. The Principal, Anganbari Worker Training Center addressed a letter to the Administrator, Bihar State Council for Child Welfare wherein he mentioned that the present petitioner, on account of illness, after



taking permission, had gone for leave. He was treated by Dr. B. Banerjee in his residence, when he recovered, he joined the post on 17.2.1998. Hence, the Principal, vide letter dated 28.2.1998 (Annexure-2) requested the Administrator that the period 9.12.1997 to 14.2.1998 be adjusted against his earned leave. The marriage of the petitioner was solemnized on 22.5.1998, for that, he had filed an application on 13.5.1998 for granting leave from 18.5.1998 to 28.5.1998 but, he continued on leave and his absence was found from 29.5.1998 to 13.2.1999 for his treatment and treatment of his wife on account of various ailments.

The application for leave was received by the Principal on 30.6.1998 for the leave period from 29.5.1998 to 30.6.1998. The application dated 24.7.1998 was filed for extending the period of leave up to 31.7.1998. The leave application dated 31.7.1998 was filed for grant of leave from 1.8.1998 to 15.8.1998 and he again remained absent from 16.8.1998 to 31.8.1998 vide application dated 16.8.1998. and for the leave between 1.9.1998 to 25.9.1998, an application was filed on 17.9.1998 and for the period 26.9.1998 to 31.10.1998, the application dated 31.10.1998 was filed for leave period 1.11.1998 to 15.11.1998 the application dated 3.11.1998 was filed, and for the period from 16.11.1998 to 15.12.1998, an application was filed on 3.12.1998, for the period from 16.12.1998 to



31.12.1998, he filed an application on 21.12.1998 and for the period 1.1.1999 to 20.1.1999, an application was filed on 9.1.1999 and for the period from 21.9.1999 to 31.9.1999, leave application was filed on 21.1.1999 and for leave period from 1.2.1999 to 6.2.1999, an application was filed on 1.2.1999 and for the period 7.2.1999 to 12.3.1999, an application was filed on 1.2.1999 and for the period 7.2.1999 to 12.3.1999, leave application was filed on 10.2.1999 and finally, he joined the service on 15.2.1999. After joining, he produced all the medical prescriptions and doctors' certificate, the Principal, vide letter no. 192 dated 15.2.1999 requested the Administrator, Bihar State Council for Child Welfare for sanction of leave to the petitioner from 29.5.1998 to 13.2.1999 so that due salary can be paid to the petitioner. The same was received by the Administrator on 19.2.1999 whereafter a letter dated 17.3.1999 was addressed to the petitioner asking him to give explanation of unauthorized leave showing irresponsibility and indiscipline and submit explanation within a period of seven days as to why he should not be terminated from service. On receipt of the same, he filed explanation on 27.3.1999 wherein he has stated that he had already given information of his absence to the Controlling Officer and have been discharging the duty on and from 15.2.1999 regularly. The letter dated 17.3.1999 written by the Principal was calibrated as defence of the petitioner,



requested the period of absence should be treated to be leave.

The petitioner filed explanation, requested to treat the period on leave, whereafter vide order dated 15.7.1999 (Annexure-8), the services of the petitioner was dispensed with on account of unauthorized absence. Against that order, the petitioner approached this Court in C.W.J.C. No. 10577 of 1999 and this Court remanded the matter back holding that it requires regular departmental enquiry and take the matter to its logical end in accordance with law but, in the order, it has been mentioned that “The validity of the impugned order shall abide by the result of the proceeding. The petition stands disposed of.” Against that, the petitioner moved before the Division Bench in LPA No. 160 of 2001 and vide order dated 27.2.2001, the Court refused to interfere with the order and the appeal was accordingly disposed of. Against that, the petitioner had filed representation before the authority concerned on 15.2.2001 brining to the notice the order passed by this Court and further representation was filed by him on 19.3.2001 and, after that, a proper charge-sheet was served with five charges leveled against the petitioner, one of the charges was of being remained absent, whenever the petitioner had remained present, never discharged the duty of training center (Annexure-11). The petitioner filed application for supply of the document which was taken cognizance by the Enquiry Officer but, the



Principal, Anganbari Training Center vide letter dated 2.8.2001 refused to supply, having administrative privilege and, accordingly, he was deprived of the letter no. 123 dated 21.9.1998 which the petitioner has claimed to have caused prejudice in defending his case before the Enquiry Officer. When the document was refused, he filed an application on 8.9.2001 giving details not only non-supply of the document but also other points for consideration by the Enquiry Officer. It appears that he has further filed an application on 19.9.2001, by this letter, he has filed a corrigendum whereby certain defects in application were corrected, also requested for supply of written submission filed by the prosecution. Altogether three witnesses were named by the prosecution, namely, Sri S.P. Chakravorty and Sri Hira Lal Choudhary, the Programme Officer and the Principal Anganbari Training Center. Principal was not examined, two witnesses mentioned in the list of witnesses were examined which are Annexure-16 Series, whereafter, the Enquiry Officer submitted the enquiry report to the competent authority but, the enquiry report was not served upon him prior to the order of punishment but along with the order of punishment dated 6.12.2001 i.e. termination from service. Against that, the petitioner moved before this Court in C.W.J.C. No. 2656 of 2002 which was dismissed but, the petitioner filed appeal vide L.P.A. No. 1029 of 2008 which was allowed and the Court



directed the respondent to serve the copy of enquiry report and after receipt of the show-cause, may pass an order on its merit, whereafter, the enquiry report was served upon the petitioner and the petitioner filed his detailed explanation, the cause for his absence, filing of applications for leave from time to time in detail and, ultimately, vide order dated 1.10.2012 (Annexure-22 Series), the order of punishment has been passed.

Learned counsel for the petitioner has raised the points that the petitioner was not given the letter no. 123 dated 21.9.1998 and non-service of letter vitiates the entire proceeding. Further that after the order of setting aside the order of termination, firstly, the authority was required to reinstate the petitioner, only, thereafter, further proceeding could have been taken against the petitioner and, at least, after Division Bench order, which was passed in his favour. Further stated that his explanation was not considered and the disciplinary authority, without taking note of his explanation, has passed the order which suffers from illegality and in support of his submission, he has placed reliance on the judgment in the case of *State of Uttar Pradesh & Ors. Vs. Saroj Kumar Sinha* reported in 2010 (2) SCC 772 (Paragraph nos. 27 & 28). Further argued that the order passed against him is shockingly disproportionate and requires interference. Further said that the Enquiry Officer has not conducted the enquiry properly as the



prosecution has failed to bring oral witnesses and failed to take into consideration the deposition in proper perspective. Learned counsel for the petitioner has also submitted that the enquiry officer has not conducted the enquiry fairly and properly as oral evidence was not handed over to him by the prosecution. On the proportionality, he has placed reliance on the judgment in the case of *State Bank of Patiyala & Ors. Vs. S.K. Sharma* reported in *1996 AIR 1669* ≈ *1996 (3) SCC 364*.

Learned counsel for the State has submitted that he was given all opportunities, every time this Court has given relief to the petitioner and the enquiry proceeding cannot be faulted, the charges are serious in nature as he remained absent for 754 days in total 3 years of service. Certain lapse in the procedural irregularity will not ipso facto vitiate the proceeding but, interference would be permissible subject to showing the prejudice, has placed reliance on the judgment in the case of S.K. Sharma (supra).

Learned counsel for the petitioner has submitted that he had filed applications from time to time but, the applications were never rejected, in that event, it will be presumed that the authority granted the leave.

Learned counsel for the State has submitted that mere filing of the application will not be treated to have been granted leave unless it is specifically granted.



In the present case, the petitioner has taken three grounds for setting aside the order of dismissal from service. Firstly, he has taken a plea that he has been deprived of letter no.123 dated 21.9.1998 which vitiate the proceeding but no where he has stated that what prejudice has been caused to the petitioner. Merely violation to supply the document will not vitiate the proceeding unless the prejudice is shown to the delinquent in defending his case in the enquiry proceeding. Reliance can be placed on the judgment in the case of S.K. Sharma (supra). It is relevant to quote paragraph no. 32 of the said judgment wherein it has been held that the nature of violation and prejudice with the guiding factor for deciding the legality of the proceeding.

“32 We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural



in character.

(2) *A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.*

(3) *In the case of violation of a procedural provision, the position is this : procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under 'no notice', 'no opportunity' and 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case*



where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) here in below is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If



he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B. Karunakar, (1994 AIR SCW 1050). The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) *Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice - or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order / action - the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and not adequate opportunity, i.e., between "no notice"/"no hearing" and "no fair hearing." (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with*



the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the stand-point of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the court /tribunal/authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of state or public interest may call for a curtailing or the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.”

In the present case, this Court is of the view that no prejudice has been shown, merely non-supply of the document will be



ipso facto lead to vitiate the entire proceeding. When the petitioner was given opportunity to cross-examine the witnesses and examine the witness, he was served with the copy of the enquiry report, he has submitted the explanation, the same was considered and final order has been passed. Second point has been taken that as the order of termination was set aside, the Management was required to first reinstate the petitioner and only then they could have proceeded further. That ground also cannot be sustained in view of the fact that the order of termination was set aside only on the ground of technical ground of non-service of copy of the enquiry report and, inasmuch as, this Court in C.W.J.C. No. 10577 of 1999 (Pramod Kumar Prasad Vs. State of Bihar & Ors.), has recorded that the validity of the impugned order shall abide by the result of the proceeding and, as such, the claim of the petitioner that reinstatement should follow, the further proceeding was/is not sustainable and, accordingly, his plea is rejected. The third ground has been taken that the punishment is very excessive. For testing this plea, it has to be noted that in three years, the petitioner has remained absent for 754 days. Every time, he has filed the application, left the Headquarter without awaiting the outcome of his leave application. Merely an employee files a leave application, that does not mean that the leave has been granted unless the specific order is passed by the competent authority. When the



petitioner has remained absent for such a long period, during the period of three years, itself indicates that he was negligent in duty and the punishment is not shockingly disproportionate that no reasonable person can pass such an order.

This Court would have interfered in the matter when the order is such a shockingly disproportionate. This is not a situation in the present case. The reliance placed on the judgment in the case of Saroj Kumar Sinha (supra) is not applicable to the present case as this Court is of the view that enquiry proceeding has been conducted fairly and properly, petitioner has not shown, the prejudice has been caused to the petitioner during enquiry proceeding on account of non-supply of the document.

This Court does not find any merit in the present case, accordingly, this writ application is dismissed.

(Shivaji Pandey, J)

Rishi/-

AFR/NAFR	NAFR
CAV DATE	NA
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