IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5744 of 2014

==

Dr. Onkareshwar Prasad, Son of Late Akhileshwar Prasad, Resident of Flat No.201 'D', Lekhraj Parishar, Road No.3, East Patel Nagar, Police Station- Shastrinagar, District Patna-800023

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Government of Bihar having his office At Old Secretariat, Police Station Sachivalaya, District Patna
2. The Principal Secretary, Planning and Development Department, Government of Bihar having his Office at Old Secretariat, Police Station Sachivalaya, District Patna
3. The Joint Director, Planning and Development Department, Government of Bihar having his office at Old Secretariat, Police Station Sachivalaya, District Patna
4. The Principal Secretary, Finance Department, Government of Bihar having his office at Old Secretariat, Police Station Sachivalaya, District Patna
5. The Special Secretary, Planning and Development Department, Government of Bihar, having his office at Old Secretariat, Police Station Sachivalaya, District Patna
6. The Deputy Secretary, Planning and Development Department, Government of Bihar, having his Office at Old Secretariat, Police Station Sachivalaya, District Patna
7. The Accountant General (Accounts And Entitlement), Bihar, Patna having his office at Birchand Patel Path, Police Station Kotwali, District Patna
8. The Treasury Officer, Patna having his office at Vishwesharaiya Bhawan, Police Station Shastrinagar, District Patna.
9. The Bihar Public Service Commission through the Secretary, Bihar Public Service Commissioner, 15, Bailey Road, Patna.

.... Respondents

==

Appearance :

For the Petitioner/s : Mr. Rupak Kumar, Advocate.

For the Respondent/s : Mr. Manoj kr. Ambastha, Advocate.

==

CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA

ORAL JUDGMENT

Date: 20.04.2018

Heard both sides.

The petitioner in this writ petition seeks relief for quashing of the Letter No.4327 dated 03.10.2013 issued by the Joint Director, Planning and Development Department, Bihar, Patna, whereby and whereunder the revision preferred by the petitioner under Rule 28 of Bihar C.C.A. Rules, 2005 has been dismissed and the penalty imposed upon the petitioner vide Notification as contained in Memo No. 1929 dated 23.05.2012 has been confirmed (Annexure-1).

The petitioner further seeks quashing of the Notification as contained in Memo No.1929 dated 23.05.2012 issued by the Deputy Secretary to Government, Planning and Development Department, Government of Bihar, whereby 5 % pension of the petitioner has been deducted retrospectively from the date of issuance of the order i.e. 23.05.2012 (Annexure-2). The petitioner further seeks direction to the respondents to restore his full pension.

The facts in brief, relevant to the case, is that the petitioner was appointed as Senior Research Officer in the Bihar State Planning Board under Planning and Development Department, Bihar on 03.07.1975. The petitioner was subsequently promoted to different posts and finally retired from the post of Chief Director, Bihar State Planning Board, Bihar, Patna on 31.07.2004. After superannuation of the petitioner, the petitioner received Notification dated 19.09.2006 and the Resolution No.2409 dated 20.07.2007, by which the Government of Bihar resolved to initiate proceedings against the petitioner under Rule 43(b) of the Bihar Pension Rules. Departmental

Enquiry Commissioner, Bihar and Sri Kalyan Pandey, Deputy Director, Statistics and Evaluation Directorate were appointed as Conducting Officer and Presenting Officer respectively to enquire into the charges. The Conducting Officer submitted his enquiry report. The second show cause was asked from the petitioner vide Letter No.690 of Planning and Development Department, Bihar dated 26.02.2010 along with enquiry report. The petitioner submitted his detailed show cause on 14.08.2010 with regard to charges proved and partially proved. The disciplinary authority having received the reply of the second show cause of the petitioner, inflicted punishment withholding 5% of the pension of the petitioner vide Notification as contained in Memo No.1929 dated 23.05.2012 (Annexure-2). The petitioner filed revision before the competent authority and the Joint Director simply communicated the petitioner that the revision petition filed by the petitioner has been dismissed vide Letter No.4327 dated 03.10.2013 (Annexure-1).

Mr. Rupak Kumar, learned counsel for the petitioner assails the order inflicting punishment of withholding 5% pension of the petitioner primarily on two grounds. Firstly, the petitioner retired on 31.07.2004 but the departmental proceeding was resolved to be initiated against the petitioner vide Notification No.559 dated 26.02.2007 but the petitioner received another Notification issued on

19.09.2006 by which a departmental proceeding under Rule 43(b) of the Bihar Pension Rule is ordered to be initiated against the petitioner and the Memo of charges along with aforesaid Notification were served on the petitioner.

It is submitted that according to Rule 43(b) of the Bihar Pension Rules, a departmental proceeding if not initiated while the Government servant was in service either before retirement or during re-employment shall not to be instituted save with the sanction of the State Government and shall be in respect of an event which took place not more than four years before the institution of such proceedings. Learned counsel for the petitioner submits that the charge was served on the petitioner on 26.02.2007, and therefore, the institution of the departmental proceeding under Rule 43(b) of the Bihar Pension Rule with regard to the occurrence or incident took place before 26.02.2003 cannot be initiated. From the Memo of charges, it would appear that charge no.1 is with regard to period rendered from 11.09.2000 to 10.09.2003 and it is alleged that during this tenure of the petitioner, Rs. 3,01,453.83 was misappropriated or defalcated and different circulars and rules of the Finance Department and Treasury has not been followed. It is submitted that when the defalcation is said to have been taken place has not been mentioned in the charge sheet. Similarly charge no.2 is with regard to order taking work of cashier from Sri Jai Prakash Narayan Srivastava, Cashier from 11.09.2000 to 04.01.2001 without any proper authority. Charge No.3, charge No.4 and charge no.5 also relates with regard to omission and commission done by Sri Jai Prakash Narayan Srivastava during that period. The departmental proceeding shall be deemed to be initiated from the date on which the memo of charge is served on the delinquent. Full Bench of the Patna High Court in the case of Shambhu Sharan Vs. State of Bihar reported in **2001 PLJR Page 665** in para-8 has held that-

> **"The other point to be noticed is that a distinction is made in Rule 43(b) between a case where a disciplinary enquiry is already pending at the time of such superannuation and where no such disciplinary enquiry is pending at the time of retirement. Certain safeguards have been provided so that there may be no undue harassment after retirement when no proceeding had been initiated before his retirement. Even though there is no pending disciplinary proceeding at the time of such retirement, certain conditions, as contemplated by clauses (i), (ii) and (iii) thereof, are imposed for safeguarding the interest of the Government Servant concerned. Certain limitations on the powers of the authority concerned to initiate a fresh proceeding after retirement, where no such proceeding was initiated before such retirement, have been provided for to prevent any misuse of such power. But the question of providing such safeguard does not arise if there is already a disciplinary proceeding pending at the time of the superannuation of the Government Servant concerned. There is no question of any harassment in such a case and, accordingly, no condition has been imposed. This is a good reason for the same. Unless that power is conferred by virtue of the said provision, once a retirement takes place, then the employee concerned can easily say that he was beyond the scope of any action whatsoever. In that view of the matter, this**

provision has been made in the rule itself and the rule itself contemplates that a disciplinary proceeding, if already initiated, can be continued even after retirement. As we have already stated, that can be spelt out from the language of the provision itself, and, in any view of the matter, that can be spelt out by necessary implication. Accordingly, in our view, it is open to an authority concerned to continue with a disciplinary enquiry which was initiated before his retirement. In our opinion, once such proceeding is started, even if the person concerned retires from service, such proceeding can be continued and it is not required that there must be any government order to that effect before it can be allowed to continue. No such condition has been laid down in rule 43 in respect of a case where such a proceeding has already been initiated as required by the three conditions in respect of initiation of a fresh proceeding after such retirement. We cannot import the requirement of such a condition which is not in the rules. This would be against the principle of *cassus omissus*. If we accept the contention that such an order of the government is required before such proceeding can be continued, then we shall be introducing a condition in the rule, which the rule does not provide for. In that view of the matter, we agree with the views expressed by the latter Division Bench and we hold that the Division Bench decision in the case of Singheshwari Sahay Vs. State of Bihar and others reported in 1979 BBCJ 735 has not been correctly decided".

It is submitted that in view of the Full Bench decision of this Court clause 1, 2 and 3 of Rule 43(b) are incorporated for safeguarding the interest of the government servant concerned, certain limitations on the powers of the authority concerned to initiate a fresh proceeding after retirement, where no such proceeding was initiated before such retirement and therefore the proceeding after four years of retirement of the petitioner with regard to incident took place four years prior to institution of departmental proceeding after retirement of the petitioner cannot be initiated.

Learned counsel for the petitioner further submits that the Supreme Court has also laid down the same law in the case of State of Bihar Vs. Mohd. Idris Ansari, **reported in AIR 1995 Supreme Court 1853,** in which a departmental proceeding was initiated against a government servant after his retirement with regard to an incident took place four years ago from the date of institution of the departmental proceeding and notice was issued for withholding 75% pension of the employee. It was held that the departmental proceeding with regard to such misconduct said to have been committed by the employee four years before the date of institution of the proceeding after retirement cannot be allowed to continue and clause-3 of rule 43(b) clearly barred the institution of such proceeding in safeguarding the interest of retired employee.

The answering respondent no.2, 3, 5 and 6 filed counter affidavits and stated in para-7 of the counter affidavit that the departmental proceeding was initiated against the petitioner vide Departmental Proceeding No.177 of 2003 but admittedly no memo of charge was submitted to the petitioner while the petitioner was in service till 31.07.2004. The petitioner retired on 31.07.2004 and only thereafter the proceeding was initiated under Section 43(b) of the Bihar Pension Rule, vide Notification No.2981 dated 25.09.2006. From the memo of charges, as contained in Annexure-3 as well as Annexure-1 of the counter affidavit, it appears that the most of the incidents and the events are alleged to have taken place in between 11.09.2000 to 10.09.2003. From the perusal of the Memo of charges, it appears that no personal imputation of misconduct causing financial loss is made against the petitioner. It is alleged that during the tenure of the petitioner, certain financial irregularities against the Finance rule and the Bihar Treasury Code have been committed but no act of the petitioner was mentioned in the charge sheet. Therefore, I find that the institution of the proceedings under Section 43(b) of the Bihar Pension Rule is not permissible with regard to the incident or alleged misconduct said to have taken place four years before the date of institution of departmental proceedings. Thus the punishment in such proceeding by disciplinary authority and the order of revisional authority are not sustainable.

Mr. Rupak Kumar, learned counsel for the petitioner secondly assails the order impugned on the ground that the enquiry report is based on no evidence. The enquiry officer did not hold the enquiry in accordance with procedure laid down under different sub rules of Rule 17 of the Bihar C.C.A. Rules, 2005. Upon submission of show cause filed by the petitioner, the Enquiry Officer himself perused different documents and show cause of the petitioner and submitted enquiry report but did not ask the presenting officer to adduce evidence oral as well as documentary as envisaged under Sub rule 14 of Rule 17. Neither any witness was examined nor any document was produced in accordance with law. The petitioner was not given opportunity to cross-examine the witness or confront those documents about its reliability and genuineness. Therefore, the Enquiry Officer did not submit the report in accordance with law and the provision as contained in sub rule 23 of rule 17 of the CCA Rules, 2005. Clearly the enquiry report is based on no evidence. When the petitioner was called upon to give his show cause, the petitioner categorically submitted his second show cause on 14.08.2010 (Annexure-5) and stated that the Enquiry Officer did not comply the provision as contained in sub rule-3 and sub rule 4 of Rule-17. Besides that, the petitioner gave detailed reply but from perusal of Annexure-2, the order issued by the Principal Secretary, Planning and Development Department, it would appear that show cause of the petitioner has not at all been considered. The order of punishment does not reflect at all that the show cause filed by the petitioner on any point of charge either partially proved or proved has been considered and same simply says that the proceedee did not give any new evidence. The petitioner has made statement to this effect in para-20 of his writ petition that the Conducting Officer did not ask the presenting officer to produce evidence by examining witnesses and produce documentary evidence in accordance with law and therefore, the enquiry report itself is based on no evidence brought on the record in accordance with law but the answering respondents did not reply to the statement made by the petitioner in para-20 of the writ petition. Even evasive reply has not been given. Therefore, it is apparent that the answering respondents also admitted that during the departmental proceedings, the Conducting Officer did not record the evidence either oral or documentary and on such I have got no hesitation to conclude and hold that the enquiry report is based on no evidence. The punishment inflicted by the disciplinary authority withholding 5% pension of the petitioner on such enquiry report, which is based on no evidence and the order of the revisional authority are therefore, illegal and not sustainable.

In the result, the order dated 03.10.2013 contained in the Letter No.4327 and the Notification as contained in Memo No.1929 dated 23.05.2012 are set aside.

Accordingly, the writ petition is allowed with all consequential benefits to the petitioner and respondents are directed to restore 5% pension of the petitioner which was illegally deducted from the retrospective itself within 3 months from the date of receipt of this order.

(Prabhat Kumar Jha, J)

Amit/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	04.05.2018
Transmission Date	NA