

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.1190 of 2015
IN
Civil Writ Jurisdiction Case No. 7390 of 2014**

- =====
1. The Union of India through the Chief Security (wrongly mentioned as Secretary) Commissioner R.P.F./H.Q.N.F. Railway, Maligaon (Guwahati), Assam.
 2. The Senior Divisional Security Commissioner, R.P.F., N.F. Railway, Katihar Division, Post office and District- Katihar.
 3. The Inspector, R.P.F. Post Katihar (East), Post office and District- Katihar (Bihar).

.... Appellant/s

Versus

1. Om Prakash Roy, Son of Late Sita Ram Roy, resident of Mohalla- Baramasiya (Budhu Chak Road) Post office, Police Station and District- Katihar(Bihar).

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. D.K. Sinha, Sr. Adv.
Mr. Anil Singh, Adv.

For the Respondent/s : Mr. Om Prakash Roy (in person)

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

and

**HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date: 27-02-2018

Heard Mr. Devendra Kumar Sinha, learned Senior counsel for the appellants as well as the sole respondent who has chosen to appear in person and whose arguments remained inconclusive until rising of the Court on 23.2.2018. The matter was thus adjourned for hearing to the next day i.e 26.2.2018 but when the matter was taken up on that day, although the appellants were represented through their counsel but there was no representation on behalf of the sole respondent - writ petitioner.

Since the writ petitioner-respondent before this Court was



appearing in person that this Court by way of extra ordinary indulgence adjourned the matter for the day to enable him to ensure his representation but the adjournment has made no difference because yet there is no representation of the sole respondent.

Before we would deal with the issues raised in this appeal we are persuaded to record certain dates which would be relevant for the issue in contest.

The respondent-writ petitioner was appointed as a Constable in the Railway Protection Force and after completion of training on 26.7.1991 he was posted at Alipurduar Division whereafter he was posted at Bongaigaon division and later transferred to Katihar Division. While the respondent-writ petitioner was posted in the Katihar district that a disciplinary proceeding was initiated against him on alleged charge of misbehaving with superiors and which resulted in a penalty of dismissal. The order of dismissal was challenged by the respondent- writ petitioner before the Calcutta High Court in WP no.1758(W) of 2003. Vide judgment and order passed on 11.03.2011, the punishment of dismissal was set aside by the Calcutta High Court and the writ petition was allowed with consequential benefits, a copy of which is enclosed at Annexure-P/1 to the writ petition. In appeal before the Division Bench preferred by the Railways, the judgment and order of the learned Single Judge was



approved. The order of the Division Bench is placed at Annexure-P/2 to the writ petition.

In between, this period of dismissal and quashing of the said order by the Calcutta High Court, the petitioner got involved in a criminal case arising from G.R. Case No. 308 of 1995/T.R.No. 746 of 1996 for alleged offence punishable under Section 25 of the Arms Act. The petitioner was convicted and sentenced to undergo imprisonment of one year for the said offence.

Apart therefrom the petitioner was also involved in another criminal case arising from G.R. Case No. 300 of 1995/ Sessions Trial No. 83 of 1995 for offence punishable under Sections 366 , 366A and 376 of the Indian Penal Code in which he was convicted and sentenced to 10 years rigorous imprisonment. The petitioner by virtue of the conviction and sentence remained in custody from 28.3.1995 to 01.01.1997 and again from 02.01.1997 to 26.11.2001. These facts are very relevant for the matter in contest.

Reverting back to the punishment order passed in the disciplinary proceeding, the petitioner was reinstated vide order dated 13.9.2011 passed by the appellants, together with consequential benefits vide order present at Annexure-P/3. However, no sooner did the railways, the appellant before this Court, got information about the conviction and sentence undergone by the respondent- writ petitioner



that vide order passed on 15.9.2011, the petitioner was again dismissed from service retrospectively with effect from 28.3.1995 in exercise of power vested under Rule 161 and 162 of the Railway Protection Force Rules, 1987. A copy of the order is impugned at Annexure-4 to the writ petition and Annexure-1 to the appeal. By the same order the disciplinary authority also modified the order dated 13.9.2011 (Annexure P/3) whereby the petitioner had been reinstated with consequential benefits in compliance of the judgment and order of the Calcutta High Court to the extent that the consequential benefits allowed to the petitioner was forfeited save and except for the period 14.10.1993 to 27.3.1995.

Feeling aggrieved the respondent writ petitioner challenged this order in statutory appeal which was rejected vide order passed on 21.8.2013, a copy of which is at Annexure-P/9 to the writ petition and Annexure-2 to the present memo of appeal. It is feeling aggrieved by the dismissal order as affirmed in appeal that the respondent writ petitioner filed the writ petition in question bearing C.W.J.C. No. 7390 of 2014 praying for the following reliefs:

- “(i) Issue a Writ or Mandamus and/or Writ in the nature of commanding the Respondents to forthwith recall, rescind and order of dismissal vide D.O.No.86/Pro/2011 dated 15.09.2011 issued by Senior Divisional Security Commissioner/R.P.F./N.F. Railway, Katihar and further commanding the Chief Security Commissioner/ R.P.F./ N.F. Railway Maligaon (Guwahati) Assam.
- (ii) Issue writ of certiorari calling upon the respondents no.



1 and 2 to certify and to send upto this Hon'ble High Court, the records, papers and documents relating to the order of dismissal of the petitioner mentioned above dated 15.09.2011 and so the considerable justice may be administered by quashing the same;
(iii) Issue A writ of prohibition and /write in the nature there of prohibiting the respondents to proceed further on the basis of the impugned order.”

The learned Single Judge while upholding the dismissal order in so far as it had prospective operation from the date of its issuance quashed its retrospective effect i.e the period from which it had been made effective i.e 28.3.1995 until the date of issuance of the impugned order. The learned Single Judge also granted salary for the said period i.e 14.10.1993 up to 15.9.2011.

Mr. Sinha learned Senior counsel has been brief in his arguments when he submits that he does not seek to challenge the order of the learned Single judge in so far as it has held the retrospective operation of the dismissal order illegal. He submits that the limited ground on which the appeal is preferred is the relief of arrears of salary granted to the petitioner by the learned Single Judge even though no such prayer had been made by the writ petitioner. The arguments is contested in the light of the judgment and order of the Calcutta High Court.

The only issue which falls for consideration before this Court is, whether or not, the petitioner would be entitled to the arrears of



salary from 14.10.1993 to 15.9.2011. The other issue which would fall for consideration is whether in absence of pin pointed relief for such claim, by the writ petitioner, the learned Single Judge could have proceeded to grant him such relief. The writ petition was allowed on the following terms:

“On minute examination of rules 162.2, 162.3 and 162.4 of the Rules, it appears that the disciplinary authority, after conviction in criminal trial shall proceed against the delinquent for dismissal but 162.4 provides the head –form of charge, in such cases. The charge shall be that the accused has been convicted, imprisoned or fined, as the case may be for the offence concerned 162.4.2 provides earliest action on conviction in criminal trial. So tentatively it gives a meaning that the disciplinary authority before passing a final order in pursuance of the conviction was required to give a notice of show cause and ask him explanation about his conviction in the criminal trial but in the present case, no explanation of show cause has been asked from the petitioner. The ground that has been shown is that it was not reasonable, practicable nor expedient to hold an enquiry. This Court feels that the opinion record by the disciplinary authority is without any foundational fact as to why it was not possible, practicable and expedient to hold an enquiry when the petitioner had joined a day before and on the next day he was dismissed from service the ground shown to dispense with enquiry does not appear to reasonable and proper.

But in the present case, when admittedly, petitioner has been convicted and served 10 years imprisonment for offence, admittedly heinous, outrageous to conscience act constitutes, suffers from moral turpitude, remand of matter to disciplinary authority asking him to give show cause notice will not serve any purpose, as it will be a useless formality, nothing else.

In such view of the matter, the order of dismissal with retrospective effect is illegal, but will remain in operation prospectively. Hence, in the result,



the petitioner is entitled to salary from 14th October 1993 upto 15th September 2011.

Alternative remedy is not a bar but is a self-imposed restriction to the Court. As the petitioner is conducting his case by himself, it will be travesty of justice to ask him to first exhaust the revisional forum and then to approach this Court.

Accordingly, his petition is partly dismissed and partly allowed with the above observation/directions.”

The learned Single judge while upholding the prospective effect of the order of dismissal has found the writ petitioner entitled to salary from 14.10.1993 up to 15.9.2011 i.e until the date of passing of the order of dismissal enclosed at Annexure-1 to the appeal. It is not in dispute that the appellants have already allowed salary for the period 14.10.1993 up to 27.3.1995 to the respondent-writ petitioner as manifest from the dismissal order dated 15.9.2011. The dispute thus survives for the period 28.3.1995 until 15.9.2011.

In our opinion once the retrospective operation of the dismissal order has been quashed by the learned Single Judge in consonance with the principles, it would automatically entitle the writ petitioner to the consequential benefits and which has been allowed by the learned Single Judge.

In so far as the appellant’s argument questioning the power vested in a learned Single Judge to allow such relief is concerned, we note that it flows from the main relief even though not specifically



asked in the writ petition. The legal position in this regard is well settled to require a detailed discussions thereon. The power in a writ Court to mould a relief in exercise of jurisdiction under Article 226 of the Constitution of India is well settled and where the learned Single Judge is satisfied to grant the main relief to a writ petitioner, such power accompanies all such power for grant of consequential relief which flows from the main relief so granted.

The issue is that even if the petitioner is held entitled to back wages by virtue of the circumstances existing, is he yet entitled to the wages for the period, he was in custody. The answer is in the negative and the reason is that it is only in circumstances where the services of the delinquent though available, yet is not utilized by the employer that an issue of back wages for the period can arise but where due to the custodial situation the employer is unable to avail of his services, this principle will not apply and he shall not be entitled to wages for the said period. Reference is made to the judgment(s) reported in **2004 (2) PLJR 92 SC(Union of India and Ors. Versus Jaipal Singh)** and **(2013) 11 SCC 67 (State Bank of India & Anr. Vs. Mohammed Abdul Rahim)** which answers the issue posed.

While thus not finding any error in the power exercised by the learned Single judge to grant the consequential relief to the writ petitioner we deem it proper to clarify that despite such relief yet the



petitioner would not be entitled for the arrears of salary for the period of custody i.e 27.3.1995 until 26.11.2001, in view of the legal position explained by the Supreme Court in the judgment of **Jaipal Singh & Mohammed Abdul Rahim** (supra). On the principles so settled, the petitioner cannot be allowed salary because the inability to take work from the petitioner did not lay on the railways rather it is due to the custody suffered by the petitioner by virtue of his conviction and sentence that the railways was precluded from taking any work from him. Even otherwise, the petitioner undergoing conviction on an issue of moral turpitude, this Court is fully satisfied that he would not be entitled to the part of salary for the period 27.3.1995 until he was released from custody i.e 26.11.2001.

This Court thus while upholding the judgment and order of the learned Single Judge put in appeal before us, is persuaded to modify the judgment and order in so far as the payment of arrears of salary for the period 14.10.1993 to 15.9.2011 to the respondent-writ petitioner has been allowed by holding that the writ petitioner would though be entitled to arrears of salary for the period 26.3.2001 until the date of dismissal i.e 15.9.2011 which should be paid to the petitioner within a period of three months from the date of receipt production of a copy of this order but the writ petitioner is not legally entitled to the arrears of salary for the period 27.3.1995 to 26.3.2001 which is the period



spent in custody.

The judgment and order of the learned Single Judge stands modified to the aforementioned extent.

The appeal is allowed in part with no order as to costs.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

Bibhash

AFR/NAFR	AFR
CAV DATE	NA
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