IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.4951 of 2014

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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, Distrit Patna- 800023

.... Petitioner

Versus

1. The State of Bihar through the Chief 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, 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 Vishweshraiya Bhawan, Police Station Shastrinagar, District Patna
9. The Bihar Public Services Commission, through the Secretary, Bihar Public Service Commission, 15 Bailey Road, Patna

.... Respondents

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Appearance :

For the Petitioner/s	:	Mr. Rupak Kumar, Advocate.
For the Respondent/s	:	Mr. Kr. MANISH SC-5
		Mr. Kumar Pankaj, AC to SC-5
For A.G. Bihar	:	Mr. Satyendra Kumar Jha, Advocate
For B.P.S.C.	:	Mr. Sanjay Pandey, Advocate.
		Mr. Ranjit Sinha, Advocate.

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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 under the signature of 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 against the order of penalty as contained in Memo No. 3502 dated 24.10.2008 (Annexure-1) has been dismissed.

The petitioner further seeks quashing of the Notification as contained in Memo No.3502 dated 24.10.2008 issued under the signature of the Deputy Secretary to Government, Planning and Development Department, Government of Bihar, whereby 10 % pension has been deducted retrospectively from the date of retirement i.e. 31.07.2004. The petitioner further seeks direction to restore his full pension from the date of his superannuation i.e. 31.07.2004.

The facts in brief is relevant of 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 the post of Deputy Director on 24th October, 1988 and finally promoted to the post of Director, Directorate of Statistics and Evaluation, Bihar, Patna on 23rd May, 1997. The petitioner retired from the post of Chief Director, Bihar State Planning Board, Bihar, Patna on 31.07.2004. While the petitioner was posted as the Chief Director, Bihar State

Planning Board, Bihar, Patna, Resolution No.3101 dated 21.11.2003 was issued under Rule 55 of the C.C.A. Rules, 1930 (Annexure-3). Departmental Enquiry Commissioner, Bihar was appointed as conducting officer but in the meantime the petitioner retired from his service on 31.07.2004 but the departmental enquiry continued even after retirement of the petitioner. The petitioner was asked second show cause vide Letter No.632 dated 01.03.2006 (Annexure-5) and the petitioner gave his detailed reply (Annexure-6) on 20.03.2006. The disciplinary authority without considering the show cause of the petitioner inflicted punishment of withholding 10% pension of the petitioner vide Notification No.3502 dated 24.10.2008. The copy of punishment dated 24.10.2008 was not served on the petitioner. The petitioner made application to the Principal Secretary, Planning and Development Department, Bihar, Patna on 17.08.2012 pursuant thereto the petitioner was supplied the order of penalty dated 24.10.2008 vide Letter No.1775 dated 05.09.2012 (Annexure-7 and 8 respectively). The petitioner thereafter filed revision under Rule 28 of Bihar C.C.A. Rules, 2005 but the revision petition of the petitioner has also been dismissed vide order dated 03.10.2013 as contained in Letter No.4327.

Learned counsel for the petitioner submits that admittedly the departmental enquiry was initiated on 21.11.2003 as contained in

Memo No.3101 and the petitioner retired on 31.07.2004 but no formal order was passed to convert the departmental proceeding under Rule 43(b) of the Bihar Pension Rules. It is further submitted that the departmental proceeding initiated against the petitioner should have been converted under Rule 43(b) of the Bihar Pension Rules to enable the Departmental Enquiry Commissioner to enquire into the charges within the ambit of parameter of Rule 43(b) of the Bihar Pension Rules. After retirement, the relationship of employer and employee comes to an end and the disciplinary authority or the employer cannot inflict such punishment which can be awarded during the service of a person, such as, dismissal, stoppage of increment. It is further submitted that Rule 43(b) of the Bihar Pension Rules can be initiated when the State Government is satisfied with action/complaint against retired government servant is such would constitute a grave misconduct or if a government servant caused financial loss to the State in functioning of delinquent or his failure to set a high standard of his efficiency cannot constitute a misconduct for inviting a disciplinary proceeding. Therefore, on this count, the order of punishment without holding the misconduct of the petitioner causing any substantial financial loss to the State does not warrant any punishment.

Mr. Rupak Kumar, learned counsel for the petitioner further submits that vide resolution initiating departmental proceedings, 8 charges have been framed against the petitioner but only charge no.3 and charge no.5 relate with the financial irregularities and misappropriation. Charge no.3 is said to have been proved and charge no.5 is found to be partially proved, according to the finding of the Conducting Officer. It is further submitted that this enquiry report (Annexure-5) is based on no evidence. During the pendency of the enquiry, the Conducting Officer did not allow the Presenting Officer to produce documents and to examine witnesses. The Conducting Officer himself perused the documents, produced by the Presenting Officer and also perused the show cause of the petitioner. No document was brought on record in accordance with law. Learned counsel for the petitioner placed reliance upon the case of Roop Singh Negi Vs. Punjab National Bank & Ors, **reported in (2009) 2 SCC Page 570**. The Supreme Court has held that "***mere production of documents is not enough-Contents of documentary evidence has to be proved by examining witnesses***." During the course of enquiry, Sub rule 14 of Rule 17 of Bihar CCA Rules, 2005 clearly mandates that after filing of the show cause by the delinquent, the Conducting Officer shall ask the Presenting Officer to produce the documents as well as oral witnesses in order to prove the charges by the documents and the witnesses proposed to be proved by the disciplinary authority but no such procedure was adopted. The Conducting Officer himself acted as Presenting Officer on behalf of the department and therefore the Conducting Officer has not acted as independent adjudicator in the departmental proceedings.

Learned counsel for the petitioner further placed his reliance on the judgment of this court rendered in Kumar Upendra Singh Parimar Vs. B.S.Co-op. Land Dev. Bank **reported in 2003 PLJR 10**. Learned counsel for the petitioner further submits that the petitioner has made specific statement in para-23 of the writ petition that many relevant documents relied upon by the Departmental Enquiry Commissioner in the departmental proceedings were never supplied to the petitioner, and thus, no proper opportunity was given to the petitioner to defend his case. It is further submitted that neither any witness nor the complainant on whose complaint the departmental proceedings was initiated was examined in the departmental proceeding nor any witness was examined on behalf of the department to prove the charges but the answering respondents vide counter affidavit made evasive reply. No specific denial is made in the entire counter affidavit and virtually the statement of the petitioner is admitted that no procedure for examination of documentary as well as oral witnesses has been adopted nor the petitioner was given opportunity to cross examine those witnesses. It is submitted that the order passed by the disciplinary authority without considering the detailed show cause of the petitioner is based on no evidence and similarly the order in revision is also bad, illegal and not sustainable.

On the contrary, learned counsel for the answering respondents have filed counter affidavit but from perusal of the counter affidavit, it is crystal clear that the answering respondents no. 2, 3, 5 and 6 have not denied the statements made in para-23 of the writ petition with regard to production of documentary as well as oral evidence during the period of departmental enquiry.

So far as the first contention of the learned counsel for the petitioner is concerned, of course the departmental proceeding was initiated on 21.11.2003 by Resolution No.3101 resolving to initiate departmental proceeding and the petitioner retired on 31.07.2004 but no order was passed converting the departmental proceeding into a proceeding under Rule 43(b) of the Bihar Pension Rule, and therefore, the continuance of the proceedings after retirement of the petitioner on 31.07.2004 is without any formal order under Rule 43(b) of the Bihar Pension Rule and without any finding that the misconduct and alleged acts on the part of the petitioner caused any substantial financial loss. I find that this question has already been set at rest by a Full Bench Judgment of this court, in the case of Shambhu Saran Vs. State of Bihar, **reported in 2000 (1) PLJR 665**. In para-8 of the aforesaid judgment, it has been held as follows:-

> **"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".

From perusal of the Memo of charges (Annexure-3) it appears that altogether 8 charges were framed against the petitioner, out of which, charge no.1, 2, 4, 6, 7 and 8 are with regard to the functioning and behaviour of the petitioner in discharging his official duty as transferring the subordinate without the approval of the establishment committee, putting the subordinates under suspension and revoking the same without rhyme and reason, acquisition of property in his name and in the name of his wife without informing the employer and by issuing different circular orders with a view to harass the subordinates employees but charge no.2 and 5 are with regard to misappropriation of Rs. 6,67,846/- for purchasing a Duplicating Machine and allotment of Rs. 15 lakh for establishment of statistical office in ten districts of two zones without prior permission of the Finance Department. Therefore, the submission of learned counsel for the petitioner that the departmental proceeding after retirement shall not continue unless that resulted in substantial financial loss cannot be accepted. The petitioner is alleged to have caused financial loss to the department by committing illegality in purchasing a Duplicating Machine and allotment of money for establishment of statistical office in ten newly created districts. Therefore, I find no force in view of the law laid down by the Full Bench and on perusal of the charge sheet, I find that the continuance of the departmental proceedings against the petitioner, even after his retirement on 31.07.2004 is not illegal and no need of formal order is required for continuance of the departmental proceeding, if initiated, while the petitioner was in service after his retirement.

So far as second submission of learned counsel for the petitioner that enquiry report is opinion of the enquiry officer and based on no evidence, as the Conducting Officer did not conduct the enquiry in accordance with procedure laid down under Sub Rule 14 of Rule 17 of C.C.A. Rules, 2005, which clearly mandates that the Conducting Officer shall ask the Presenting Officer to fix the date of examination of witnesses and produce the documentary evidence on the basis of which the disciplinary authority proposed to prove the charges. It appears that answering respondents have filed counter affidavit but the facts stated by the petitioner in para-23 of the writ petition with regard to non-examination of any witnesses including the complainant, who made complaint against the petitioner about different illegalities and irregularities alleged to have been committed by the petitioner in discharging of his administrative and financial function have not been examined nor any documents was produced in accordance with law. Therefore in absence of denial to the statement specifically made by the petitioner with regard to the examination of the witnesses and production of documents during the course of departmental proceedings, this court did not think it necessary to call for the Departmental Enquiry Record. If the Conducting Officer does not examine any witness or allow the Presenting Officer to produce any documents, in accordance with law and the petitioner admittedly was not provided opportunity in absence of non-examination of witnesses and non-production of documents, in accordance with law to cross-examine such witnesses and the author of documents and that amounts to not providing sufficient opportunity to the Proceedee to defend his case and same amounts to violation of natural justice and on this count, the enquiry report is based on no evidence. If the disciplinary authority passed the order inflicting, any punishment on such enquiry report, which is based on no evidence, the order of the disciplinary authority including such any punishment as well as order of appellate authority ignoring these facts are illegal and not sustainable.

> In the case of **Kumar Upendra Singh Parimar**, this court has held that "**where rules provide for holding a regular departmental enquiry, it is necessary to prove the charges against the delinquent employee by producing the departmental witnesses and by examining them by the enquiry officer- this is necessary even if the delinquent employee does not**

attend the enquiry- the onus of proving the charges is cast on the department and not on the delinquent employee- therefore, if no witness is called by the department in support of the charges in that case it should be held that the department has not proved its case and in such a situation the enquiry officer cannot record the findings with regard to guilt against the delinquent employee just because the delinquent employee is absent- it cannot be accepted that since the charges are based upon the documents so no witnesses need be examined to bring home the charges- the enquiry report in such cases used loses all its importance and the punishment imposed cannot be sustained."

In the case of **Roop Singh Negi**, the Apex Court has held that "**during the course of departmental enquiry, none examination of any witness and mere production of documents without examining the author of the documents in accordance with law cannot prove the charge. The contents of documentary evidence has to be proved by examining witnesses"**.

Having considered the facts and discussions made above, I find that the order of the disciplinary authority is based on such enquiry report, which is based on no evidence on account of non-examination of any witnesses or non-production of documents in accordance with law without providing the delinquent to cross-examine such witnesses, amounts to not providing sufficient opportunity to the delinquent, and thus, the same amounts to violation of natural justice and the order cannot be sustained. Even the appellate/revision order without discussing or taking into consideration the grounds taken by the delinquent is bad and illegal and not sustainable as the order entails substantial consequences and in that view of the matter, the authorities are required to pass order, which reflects the consideration of the grounds taken by the delinquent and if the order does not reflect this fact that the authority considered the grounds taken by the delinquent amounts to non-providing sufficient opportunity to the delinquent, the same is vitiated on account of violation of principle of natural justice. Therefore, both the orders dated 03.10.2013 and 24.10.2008 as contained in Memo No. 3502 are not sustainable and are set aside.

The writ petition is allowed with all consequential benefits to the petitioner and respondents are directed to restore 10% 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