

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.1641 of 2016

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Dr. (Smt) Swarn Lata Sinha, Wife of Sri Raj Kishore Sinha, resident at Rupantar Matri Sewa Sadan, Tilatand, P.O. Katrash, Police Station- Katrash, District- Dhanbad, Jharkhand. At present residing at St. Pole School Campus, Kachitalaw, Gardanibagh, P.S. Gardanibagh, District- Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary, Health Department, Government of Bihar, Patna.
3. The Secretary, Department of Health, Medical Education and Family Planning, Government of Bihar, New Secretariat, Patna.
4. The Deputy Secretary, Department of Health, Medical Education and Family Planning, Government of Bihar, New Secretariat, Patna.
5. The Civil Surgeon -cum- Chief Medical Officer, Sasaram.
6. The Medical Officer, Sadar Hospital, Sasaram.
7. The Regional Deputy Director, Department of Health, Medical Education and Family Planning, Sasaram.
8. The Bihar Public Service Commission, Bailey Road, Patna through its Chairman.
9. The District Provident Fund Officer, Sasaram.
10. The Director, General Provident Fund, Pant Bhawan, Bailey Road, Patna.
11. The Chairman, Bihar Public Service Commission, Bailey Road, Patna.
12. The Accountant General (Bihar), Virchand Patel Path, Patna.

.... Respondents.

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Appearance :

For the Petitioner/s	:	Mr. P.K. Shahi, Sr. Adv. with Mr. Sanjeev Kumar Mishra, Adv. Ms. Priya, Adv. Ms. Neha Gupta, Adv.
For the Respondent-State	:	Ms. Binita Singh, SC-28 Mr. Apurv Harsh, AC to SC-28
For the Respondent-BPSC	:	Mr. Sanjay Pandey, Adv.
For the Respondent-AG	:	Ms. Namrata Mishra, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 03-07-2018

Heard Mr. P.K. Shahi, learned senior counsel appearing for the petitioner assisted by Mr. Sanjeev Kumar Mishra, the Advocate on record and Ms. Binita Singh, learned Standing Counsel No.28, who appears with her assisting counsel Mr. Apurv Harsh.



This writ petition is filed under Article 226 of the Constitution of India to question the order bearing Memo No.866(9) dated 01.10.2015 passed by the State Government in its Health Department in exercise of power vested under Rule 43(b) of the Bihar Pension Rule, 1950 (hereinafter referred to as the 'Pension Rules'), whereby the entire pension of the petitioner has been forfeited on a permanent basis. A copy of the order is impugned at Annexure-23 to the writ petition.

Before I proceed to deal with the arguments advanced by learned counsel appearing for the contesting parties, I deem it necessary to briefly discuss the sequence of events as it gains importance in the nature of the order which this Court proposes to pass.

With the consent of the parties, the writ petition has been heard with a view to its final disposal at the stage of admission itself.

The records of the proceeding do manifest that the petitioner was appointed on the post of Assistant Civil Surgeon on 29.04.1971. She was granted time bound promotion on 05.01.1990. A departmental proceeding was initiated against the petitioner vide order bearing Memo No.73 (18) dated 10.01.1997 at Annexure-3. The petitioner filed her reply at Annexures 4 and 5 praying for



exoneration from the proceeding. No order was passed. Being constrained the petitioner filed CWJC No.9723 of 1996 and a coordinate Bench of this Court vide order passed on 18.08.1997 at Annexure 6 issued directions to the respondent authorities to accept the joining of the petitioner and pay her legitimate dues. Following the order that the petitioner was allowed to give a joining on 18.12.1997 vide Annexure-8.

The pleadings on record would further confirm that an application for voluntary retirement was filed by the petitioner on 01.09.2000, a copy of which is enclosed at Annexure-9. The application addressed to Secretary of the Health Department was received on 04.09.2000 as confirmed from the receipt present on the application. No order was passed thereon rather on the basis of an inspection report of the Minister, Health which recorded the absence of the petitioner since after 16.01.1996 that a second proceeding was initiated against the petitioner on 31.10.2002 as stated by petitioner.

Be it noted that the inspection by the Minister of the Department was carried out on 18/19.12.2000 and much prior thereto on 01.09.2000, the petitioner had already submitted her application seeking voluntary retirement. It is during the pendency of the disciplinary proceedings so initiated that in normal course the



petitioner superannuated on 31.03.2004 but the proceeding continued after being converted into a proceeding under rule 43(b) of the 'Pension Rules', the inquiry report of which is enclosed as Annexure-20 to the writ petition. The Enquiry Officer even while noting the application of the petitioner for voluntary retirement filed on 01.09.2000, upholds the charges of unauthorized absence since after 25.01.1998.

The Inquiry so initiated on 31.10.2002 resulted in punishment order bearing Memo No.320 dated 24.03.2006, whereby the entire pension of the petitioner was forfeited in exercise of powers vested under rule 43(b) of 'the Pension Rules'. Feeling aggrieved the petitioner came before this Court in CWJC No.22260 of 2011 which was allowed vide judgment and order passed on 31.07.2013 at Annexure-12, inter alia, on grounds of denial of reasonable opportunity to the petitioner. The matter was remitted back to the punishing authority for hearing and disposal afresh and in accordance with law.

Following the order passed by this Court that vide notification bearing Memo No.1304(9) dated 17.10.2003 the punishment order was recalled and a decision was taken to proceed afresh against the petitioner. A copy of the notification dated 17.10.2003 is enclosed at Annexure-14 and is followed by another



notification bearing Memo No.1360 (9) dated 30.10.2003, whereby the Presenting Officer and the Conducting have been appointed. The inquiry so initiated has resulted in the report bearing Memo No.24 dated 08.09.2014 at Annexure 20, whereby the Inquiry Officer has upheld the charge of unauthorized absence against the petitioner for the period 25.01.1998 to 31.03.2004. The Inquiry Officer though has taken note of the application filed by the petitioner seeking voluntary retirement on 01.09.2000 but has brushed it aside by holding that it was a ploy of the petitioner to avoid the disciplinary proceeding. The petitioner was served with a copy of the report, to which she filed her reply but has been met with the punishment order forfeiting the entire pension in exercise of power vested under rule 43(b) of the 'Pension Rules' vide notification bearing Memo No.866 (9) dated 01.10.2015 of the State Government in its Health Department impugned at Annexure-23 and feeling aggrieved she is again before this Court.

Mr. Shahi, learned senior counsel has appeared for petitioner to canvas on the merits of the case and to demonstrate that the finding on unauthorized absence was not supported by the materials on record. He also makes reference to the application filed by the petitioner seeking voluntary retirement on 01.09.2000 at Annexure-9 to contest the disciplinary proceeding which relevant aspect had



been brushed aside not only by the Inquiry Officer but even the State while passing the impugned order has failed to take note of the important event which changes the course of the present proceedings. The filing of the application for voluntary retirement is not contested and is present at Annexure 9 to the writ petition with due receipt thereon. In fact, the Inquiry Officer while submitting his report has taken note of the submission of the petitioner as manifest from Annexure 20 but while recording his opinion, he has held that since the disciplinary proceeding had already been initiated, it is to avoid the said proceeding that an application for voluntary retirement had been submitted. According to Mr. Shahi, this was an error on record because it is undisputed position that the proceeding in question had been initiated on 31.10.2002 i.e. after a lapse of more than two years of the filing of the application for voluntary retirement.

Taking note of the stipulation present in rule 74 of the Bihar Service Code which enables the employer as well as the employee to terminate the relationship on fulfillment of certain conditions and taking note of this existing circumstance that the learned State Counsel was directed to address on the issue in the uncontested position noted regarding filing of the application for voluntary retirement on 01.09.2000. The provisions underlying rule 74(b) (i)



of the Bihar Service Code are self eloquent and inter alia, mandates that a voluntary retirement would come into effect on fulfillment of three months notice period since after its filing unless the Government proceeds to reject the application for reasons reserved or the Government servant concerned is facing suspension. According to Mr. Shahi, since the petitioner was not in suspension and the disciplinary proceeding was initiated much after the filing of the applications, it had taken its effect.

Ms. Singh, learned counsel appearing on behalf of State has laboured hard to meet the situation and to support the impugned orders but in my opinion, in view of the law settled by the Courts on the interpretation of the provisions underlying rule 74(b) of the Bihar Service Code, it can not be contested that law had taken its course. The provisions underlying rule 74(b) (i) is self eloquent. If the filing of an application for voluntary retirement is accepted by the respondents and no disciplinary proceeding was pending on that date, the application would take its effect on expiry of three months notice period. Meaning thereby, the petitioner would be deemed to have been voluntarily retired with effect from 01.01.2001 i.e. on expiry of three months notice period.

Mr. Shahi, learned senior counsel appearing on behalf of the petitioner in support of his submission that no disciplinary



proceeding can be initiated after the filing of the application for voluntary retirement, has relied upon the following judgments:

- (i) **AIR 1995 SC 176 (Union of India Vs Sayed Muzaffar Mir)**. This was a matter relating to voluntary retirement arising under the Indian Railways Establishment Code. The Supreme Court taking note of the provisions relating to voluntary retirement present in the Indian Railways Establishment Code has while taking note of its earlier opinion at paragraph 5, held that an application seeking premature retirement does not require any acceptance and comes into effect on the completion of the notice period.
- (ii) **AIR 1978 SC 1109 (B.J. Shelat vs. State of Gujarat)**. In the said case a disciplinary action was taken against the State Government employee under the Bombay Civil Services (Conduct, Disciplinary and Appeal) Rules. Their Lordship of the Supreme Court taking note of similar provisions present in the said Rules, have held that the retirement comes into effect on expiry of notice period. It was also held that no disciplinary proceeding could have been initiated once the application was filed.
- (iii) Learned counsel has also made reference to some unreported judgment and orders passed by this Court in



CWJC 11873 of 2007 (Dr. Prem Dutta Sharma vs. The State of Bihar), CWJC No.4826 of 2005 (Dr. Krishna Kumar Mallick vs. The State of Bihar) and CWJC No.20235 of 2012 (Dr. Nirbhay Kumar Jain vs. The State of Bihar).

The issue canvassed has been discussed at length in judgment of this Court reported in **2008(4) PLJR 194 (Dr. Shah Azad Siddiqui vs. State of Bihar)** and paragraphs 9 to 11 of the judgment applies on all fours to the situation present herein and is quoted hereinbelow for ready reference:

“9. This Court has already noticed that the request for voluntary retirement was in the year, 1998 when the departmental proceedings are alleged to have been initiated in the year, 2000 long after the expiry of the three months’ notice period. The attempt in the supplementary counter affidavit by the Secretary of the Department to raise a bogey that the petitioner, in fact, never submitted any application for voluntary retirement is nothing but a subterfuge to save their own lapses. It is a matter of common knowledge that when an official representation or communication is received in the Government office it is entered in a diary, given a serial number with the date of receipt. Not having denied the same in the original counter affidavit, it is now urged that the diary itself is not traceable for which also the petitioner cannot be faulted.

10. A bare reading of Section 74(b) (i) of the Bihar Service Code makes it apparent that the option lies with the employee to initiate the process. The only right given to the Government is if the officer is under suspension to deny such option for voluntary retirement and it could also do so by express refusal during the notice period. That this was distinct from the powers of the employer under Rule 74(b)(ii) to



terminate the services after three months' previous notice or pay in lieu thereof. That the Government itself has not understood it in any other manner is apparent from the F.D. Memo. No.P.C.-2-9-9/78/6190F dated 27.04.1979 when it provides that the scheme was purely voluntary and for which the Government employee had to come forward. That such an offer could be withdrawn by the employee within the period of three months.

11. Having considered the facts and circumstances of the case, this Court holds that the petitioner is deemed to have voluntarily retired from service on 30.06.1998. Once the relationship of master and servant ceases, the question of initiating any departmental proceedings against him, therefore, simply does not arise and is a nullity."

(Emphasis is mine).

Objections have been raised by the learned State Counsel to submit that this issue was never raised by the petitioner to question the disciplinary proceeding either earlier or even in the present proceedings. In my considered opinion where the pleadings on record of any proceeding gives rise to an issue of law which renders the order put to challenge, void ab-initio, then a mere circumstance that the issue of law arising, has not found its place in the pleadings, would neither prevent the parties to a dispute in raising the issue during the course of hearing or for the court concerned to examine the same especially where it renders any proceeding, a nullity.

The exercise of jurisdiction by a Court under Article 226 of the Constitution of India is plenary and every issue which crops up is open for discussion unless it is founded on disputed facts. Such is



not the case here. The filing of the application for voluntary retirement is not in dispute and it is also not in dispute that no disciplinary proceeding was pending on that date. It is again not in dispute that the application for voluntary retirement was never rejected rather holds good. The very acknowledgement of the Inquiry Officer to the existence of such application further gives strength to the petitioner to canvass the issue.

In the uncontested circumstances noted and where the application for voluntary retirement had been filed by the petitioner on 01.09.2000 much before the initiation of the proceedings in question on 31.10.2002, the disciplinary proceeding certainly could not be initiated thereafter and in absence of any order of rejection of the application filed by the petitioner for voluntary retirement. It is thus, too late in the day for the State to question the validity of the application because on expiry of the notice period, the retirement has already taken effect and the petitioner would be deemed to have superannuated voluntarily with effect from 01.01.2001. Such being the position a disciplinary proceeding by invoking the provisions of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as the 'Disciplinary Rules') could not have been pressed into service because the petitioner had already superannuated albeit voluntarily.



In the circumstances noted the entire proceedings right from initiation on service of charge memo together with the inquiry report as well as the order bearing Memo No.866 (9) dated 01.10.2015 is an exercise void ab-initio and cannot be upheld and accordingly the order bearing Memo No.866 (9) dated 01.10.2015 impugned at Annexure-23 is quashed and set aside.

The writ petition is allowed. Let the consequences follow in form of payment of the arrears of pension together with the current pension, within 6 weeks from today.

(Jyoti Saran, J)

SKPathak/Anjula

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	24-07-2018
Transmission Date	NA

