IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.710 of 2019
In
Civil Writ Jurisdiction Case No.14636 of 2018

1. The Bihar State Warehousing Corporation B-2, 1st. Floor, Maurya Lok Complex, Patna Bihar through its Managing Director, Bihar, patna
2. The Managing Director Bihar State Warehousing Corporation, B-2, 1st. Floor, Maurya Lok Complex, Patna, Bihar.

... ... Appellant/s

Versus

1. The State of Bihar Through Principal Secretary, Department of Co-operative, Government of Bihar, Patna.
2. The Principal Secretary Department of Co-operative, Government of Bihar, Patna.
3. Sunil Kr. Sinha S/o Late Ramchandra Prasad Earlier residing At 40, Matri Smriti Congress Maidan, Near- Shiv Mandir, Kadamkuan, Patna- 800003 presently residing at Madhuri Gopi Residency Flat No.- 202, Club Road Congress Maidan, Kadamkuan, Patna- 800003, P.S.- Kadamkuan, District-Patna.

... ... Respondent/s

Appearance :

For the Appellant/s	:	Mr.Mithilesh Kumar Rai
For the Respondent/s	:	Mr.Ashish Kumar Lal

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE ANIL KUMAR SINHA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard Mr. Mithilesh Kumar Rai, learned counsel for the appellant and Mr. Ashish Kumar Lal, learned counsel appearing for respondent no. 3.

The present Letters Patent Appeal has been preferred under Clause X of the Patna High Court Rules against the judgement dated 8.5.2019 passed in CWJC No. 14636 of 2018, whereby the learned Single Judge has set aside the recovery order issued vide Memo No. 919 dated 8.5.2018, as contained in Annexure 4 to the writ application, issued under the signature of the Managing Director of Bihar State Warehousing Corporation (hereafter referred to as the 'Corporation') whereby on account of pecuniary loss of food grains in Ara Warehouse a sum of Rs.7,51,546/- had been directed to be deducted from the pensionary benefits of the respondent no.3. The learned single Judge has further directed to release the said withheld amount in favour of the respondent no. 3 within three months from the date of receipt/production of the copy of the order. So far as arrears of salary is concerned, the respondent no. 3 was given liberty to file representation, which the Managing Director of the Corporation was supposed to dispose of within three months from the date of filing of such representation and the admissible dues be released in favour of the respondent no 3 within the said period and if certain amounts are found inadmissible, the same shall be communicated by a speaking order by the Managing Director of the

Corporation (respondent no.4 in the writ petition) by registered post to respondent no. 3.

The factual matrix of the case is that Respondent No. 3 was appointed as Technical Assistant on 31.1.2018 in the Corporation vide Memo No. 557 dated 21.9.1983. The respondent no. 3 was transferred to Ara Warehouse vide Memo No. 355 dated 2.8.2004 issued by Managing Director of the Corporation, as contained in Annexure 2 to the writ application, where vide Memo No. 132 dated 4.8.2004 as contained in Annexure 2 series, the respondent no. 3 gave his joining. Thereafter, respondent no. 3 was transferred from Ara by the headquarter of the Corporation at Patna, vide Office Order no. 355 dated 7.12.2007 and by the same order one U.P. Verma was posted as Superintendent at Ara. Respondent no. 3 superannuated on 31.1.2018 from the post of Technical Assistant-cum-Centre Incharge of the Corporation. Thereafter, vide Memo No. 919 dated 8.5.2018 issued by the Managing Director of the Corporation, the post retirement dues of the respondent no. 3 were sanctioned to the extent of Rs.16,32,756/- but an amount of Rs.730/- and Rs.1620/- were withheld under different heads and an amount of Rs.7,51546/- has been withheld for the losses caused at Ara godown. Hence, instead of receiving Rs.16,32,756/-, the respondent no. 3 received only Rs.8,78,860/- and an amount to the extent of Rs.7,53896/- was withheld. Consequently, the respondent no. 3 submitted a representation before the Managing Director of the Corporation but no action was taken. Respondent no. 3, in the representation, stipulated that for the same charge, Ara P.S. Case No. 164 of 2008 was registered under Section 409 of the Indian Penal Code on 1.8.2008 against respondent no. 3 and one U.P. Verma, who is dead now. It is alleged in the said FIR that at Ara Godown No. 7, 1539 bags of wheat weighing about 1439.36.106 quintals were found missing. The said Godown was locked by respondent no. 3 and late U.P. Verma.

For the same set of charges, a departmental proceeding was also initiated against respondent no. 3. The respondent no. 3 was placed under suspension vide Memo No. 225 dated 19.8.2010 issued by the then Managing Director of the Corporation and was served with charge memo. The main charge against respondent no. 3 was that after being transferred he did not hand over the charge of Godown No. 7 of Ara Warehouse and subsequently it was found that from Godown No. 7, 1539 bags of wheat weighing about 1439.36.106 quintal was found missing. But, ultimately, the Managing Director of the Corporation, on conclusion of department proceeding, exonerated respondent no. 3 from all the charges and suspension of respondent no. 3 was revoked but after more than seven years of conclusion of the proceeding and exoneration of respondent no. 3 of all the charges, recovery order dated 8.5.2018 was passed by the Managing Director of the Corporation, only on account of the fact that criminal case is pending against respondent no. 3. The said order of recovery was challenged by respondent no. 3 through a writ application being C.W.J.C. No. 14636 of 2018, with the following prayer for relief:

> "(a) For quashing of the part of the order contained in Memo No.919 dated 08.05.2018 issued under the signature of Managing Director, Bihar State Warehousing Corporation, Patna whereby and whereunder the post retirement benefits of amount of Rs.7,51,546/- has been withheld for the losses caused in Ara godown.
>
> (b) That the petitioner prays for quashing of the File No.709 dated 14.06.2018 issued under the signature of Managing Director, Bihar State Warehousing Corporation, Patna whereby and whereunder the petitioner has been informed that an amount of Rs.7,51,546/- has been withheld because of pendency of criminal case against the petitioner for the losses caused in Ara godown before the learned Court of S.D.J.M., Bhojpur (Ara and the petitioner further prays for issuance of direction to the Managing Director, Bihar State Warehousing Corporation, Patna to release the said amount of Rs.7,51,546/- which has been withheld from the post retirement benefits of the petitioner.

(c) That the petitioner prays for payment of arrears of salary for the period spent on leave (causal leave, for seeking of which petitioner has been made an application as stated in para-41 of W.P.) 30/5/2008 to 31/05/2008, 02/06/2008 to 03/06/2008 and arrears of salary for the period spent on leave (earned leave, for seeking on which petitioner has made an application along with medical certificates as stated in para-42 to para-45 of W.P.) for the period 04.06.2008 to 23.06.2008, 26.06.2008 to 15.07.2008, 16.07.2008 to 15.08.2008, 16.08.2008 to 20.09.2008 and arrears of salary for the period April, 2008 and May, 2008.

(d) The petitioner also prays for grant of all other consequential benefits and / or also prays for grant of any other relief(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case as enumerated hereinbelow."

The learned Single Judge allowed the writ application after coming to the conclusion that after retirement of respondent no. 3, in exercise of jurisdiction under Regulation 21(1)(e) of the Staff Regulation of Bihar State Warehousing Corporation, 1958 (hereinafter referred to as the Regulation, 1958, no recovery order can be passed against a retired employee. Hence, the Managing Director of the Corporation was directed to release the withheld amount of retiral dues to the tune of Rs.7,51,546/- to respondent no. 3 within a period of three months from the date of receipt/production of a copy of the order. So far as arrears of salary is concerned, respondent no. 3 was permitted to submit a detailed representation before the Managing Director of the Corporation, which was supposed to be disposed of within a period of three months from the date of filing of such representation and admissible dues was to be paid in favour of the respondent no. 3 and if certain amounts are found inadmissible, the same shall be communicated by a speaking order by the Managing Director of the Corporation to the respondent no. 3. Hence, the present appeal by the Corporation.

Mr. Mithilesh Kumar Rai learned counsel for the appellants submits that the writ court ought not to have interfered with the recovery order since there is a provision of appeal under Regulation 25 of the Regulation, 1958 and has placed reliance upon the judgement in the case of Commissioner of Income Tax and Ors. Vs. Chhabi Lal Das, reported in (2014) 1 SCC 603. It is further submitted that the learned Single Judge has failed to appreciate that huge amount of wheat were found missing from the godown of the Corporation at Ara Centre, of which the respondent no. 3 was incharge for the relevant time. Hence, the order of recovery ought not to have been interfered with.

Learned counsel for the respondent no. 3 submits that the respondent no. 3 retired on 31.1.2018 whereas the recovery order was passed on 8.5.2018. Regulation 21 of the Regulation, 1958 stipulates imposition of penalty either of being held guilty or of being found negligent, inefficient or indolent in performance of his duties or knowingly found doing anything detrimental to the interests of the Corporation or in conflict with its instructions or of committing a breach of discipline being guilty of any other act of misconduct, misdemeanour or is convicted of a criminal offence. Since respondent no. 3 was exonerated in the departmental proceeding for the charge of causing loss to the Corporation and it is an admitted position that he has not been convicted in the criminal case till date, hence, the order of recovery dated 8.5.2018 in exercise of jurisdiction under Regulation 21 of Regulation 1958 is absolutely misconceived as the exercise of Regulation 21 can be made either if the delinquent is an employee or if he has been convicted for the criminal charge. In the present case, respondent no. 3 retired on 31.1.2018, hence in exercise of Regulation 21, the order of recovery could not have been passed since respondent no. 3 has not been convicted till date, nor he was an employee of the Corporation on the relevant date.

So far as alternative remedy available under Regulation 25 of Regulation, 1958 is concerned, that is also available to the employee if the order has validly been passed under Regulation 21 thereof. Regulation 25 of the Regulation 1958 reads as follows:

"25. Appeals

(1) Every employee shall be entitled to appeal against any order imposing any penalty specified in Regulation 21.

(2) An appeal shall lie :-

(a) Where the order imposing the penalty is made by the Managing Director to the Chairman.

(b) Whether the order imposing the penalty is made by the Executive Committee to the Board of Directors.

(c) No appeal shall lie against any order of the appellate authority, or of the Board of Directors."

Learned counsel for respondent no. 3 relied upon a Full Bench judgement in the case of Shambhu Saran Vs. The State of Bihar reported in 2000(1) PLJR 665. Since the Regulation, 1958 does not adopt the provision of Bihar Pension Rules for its employees in case of any financial irregularity or grave misconduct, the recovery order is bad in law and facts. Hence, the order passed by the learned Single Judge needs no interference.

Having heard learned counsels for the parties, this is not in dispute that respondent no. 3 retired on 31.1.2018 and the recovery order was passed on 8.5.2018 and for the same charges he has been exonerated vide order dated 15.2.2011 in a duly constituted departmental enquiry passed by the Managing Director of the Corporation. Regulation 21 of the Regulation, 1958 stipulates the provision of penalty if the employee of the Corporation is held guilty or of being found negligent, inefficient or indolence in performance of his duties or knowingly found doing anything detrimental to the interests of the Corporation or in conflict with its instructions or of committing a breach of discipline being guilty of any other act of misconduct, misdemeanour or is convicted of a criminal offence. Under the given breach and finding of guilt, the penalty which can be imposed are fine, censure, delay or stoppage of increments or promotion, reduction to a lower post, recovery from pay, removal or dismissal. Regulation 21 of the Regulation 1958 reads as follows:

> *"21. Imposition of penalties:-(I) Any employee committing a breach of the regulations of the Corporation or being guilty of negligence, inefficiency or indolence in performance of this duties or knowingly doing anything detrimental to the interests of the Corporation or in conflict with its instructions or of the committing a breach of discipline being guilty of any other act of*

misconduct, misdemeanour of is convicted of a criminal offence shall be liable to the following penalties:-

(a) Fine

(b) Censure,

(c) Delay or stoppage of increments or promotion,

(d) Reduction to a lower post in his permanent class or to lower stage in his incremental scale

(e) Recovery from pay of the whole or part of the pecuniary loss caused to the Corporation by the employee,

(f) Removal,

(g) Dismissal,

Provided that the penalty of fine shall be imposed on employees of class III only."

The above quoted regulation suggests that the penalty prescribed can be imposed only against an employee, particularly, after being held guilty in a departmental proceeding or being convicted for a criminal charge. This is not in dispute that the respondent no. 3 retired on 31.1.2018 and recovery order was passed on 8.5.2018. Hence, on the day the jurisdiction under Regulation 21 was exercised, the respondent no. 3 was no longer an employee of the Corporation and Regulation 21 does not envisage any penalty of recovery from the pension, which has already been sanctioned.

Similar issue was considered by a learned Single Judge of this Court in the case of Awadhesh Singh Vs. The State of Bihar and ors. (CWJC No. 11254 of 2017) wherein it has been held that Bihar Pension Rules is not applicable to the employees of the Corporation, as the said Regulation does not enable the disciplinary authority to proceed against a superannuated employee since neither the regulation has been amended nor the Bihar Pension Rules has been adopted so as to proceed against a superannuated employee. Relevant portion of the order reads as follows:

> "It is rather peculiar that even though this issue was raised by the petitioner before the Appellate Authority as manifest from the appellate order and even though he has partially accepted the position that no proceeding under rule 43(b) of the Bihar Pension Rules was initiated against the petitioner but it is on a complete misconception of the provisions underlying Regulation 21(2)(iv) that he has proceeded to uphold the order when in fact the said provision also does not confer any jurisdiction on the Disciplinary Authority to proceed against a superannuated employee rather it merely draws the procedure to proceed against a "Corporation" employee which status has come to an end on the superannuation of the petitioner."

In the Full Bench judgement in the case of Shambhu Saran (supra), it has clearly been held that the proceeding can continue or be initiated against the retired employee by resorting to the provision of

Section 43(b) of Bihar Pension Rules. Paragraph 5 of the judgement reads as follows:

> "….. ….. …. In this context, it may be pointed out that if the Government servant is in service, the disciplinary proceeding can be initiated against him and certain punishments may be imposed upon him as provided in the relevant Classification, Control and Appeal Rules. However, such punishments cannot be imposed upon him if retired from service. After his retirement he cannot be punished otherwise but pension can be withheld and other steps taken as contemplated by the said Rule 43. Punishments, major or minor, like dismissal or removal from service or withholding of increments etc., which contemplates that he is still in service, cannot be imposed upon him. In such view of the matter, if such a person has committed some wrong, merely because he retires and no remedy remains available to the Government even if there was good case against him, then it would be incongruous. Accordingly such a provision was made to that effect. It is in order to fill up this lacuna those provisions like rule 43(b) has been introduced."

So far as reliance being placed by learned counsel for the appellant to the case of Commissioner of Income Tax (supra) is concerned, in the said case the assessment order in the Income Tax Act was challenged without availing the alternative remedy of appeal where it was held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. Paragraph 15 of the judgement reads as follows:

> “15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has restored to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case, Titaghur Paper Mills case and other similar judgements that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

Coming to the facts of the present case, it is an admitted position that the employer-employee relationship between the appellant and respondent no.3, existed only until 31.01.2018. Hence, w.e.f. 01.02.2018, respondent no.3 ceased to be an employee of the Bihar State Warehousing Corporation.

The Bihar State Warehousing Corporation, Staff Regulation, provides and guides the service rules and condition of the employees of Bihar State Warehousing Corporation.

Regulation 3(d) defines ‘Employees’ as under :-

“Employees’ means a person in the whole time or part time service of the Corporation but does not include a person, employed on daily wages or on contract.”

In view of Regulation 3(d), respondent no.3 does not come within the ambit of employee of the appellant Corporation. Moreover, there is no provision with regard to a retired employee, who may have committed any breach, or may have done any act detrimental to the interests of the Corporation, while such retired person was an employee.

Regulation 21 specifically deals with imposition of penalties with regard to any employee, meaning thereby that the said Regulation is applicable only to a person who is an employee of the appellant Corporation.

Regulation 25 deals with the provision of appeal, which shall be available to every employee against whom any order imposing any penalty under Regulation 21, has been passed.

Hence, it is apt, clear and unambiguous, that an order of penalty could not have been passed against any person, who ceased to be an employee of the appellant Corporation.

Under Such circumstances, although the alternative remedy of appeal is stipulated in the Regulation, 1958, the same would be applicable only vis-a-vis an employer and not against a person, who has ceased to be an employee of the appellant Corporation. Thus, the order of penalty of recovery from pensionary benefits of respondent no.3 is without jurisdiction.

In the given circumstances, the prevalence of exceptional circumstances weights in favour of the respondent no.3 and it cannot be said in any manner that any alternative remedy was available to respondent no.3. Moreover, once respondent no.3 was exonerated in the duly conducted departmental proceeding, there was no occasion to penalise the respondent no.3 after his superannuation. Yet again, from the records, it does not appear that any notice was given to the respondent no.3 before penalizing him with recovery of amount from his pensionary benefits, which is gross violation of principles of natural justice.

Moreover, in the said case referred to by the appellant, i.e., Commissioner of Income Tax (supra) also, it was admitted that under certain exceptional circumstances, the discretionary jurisdiction under Article 226 of the Constitution can be exercised instead of the alternative remedy being available. It is well settled law that where the alternative and efficacious remedy is available then the exercise of discretionary jurisdiction under Article 226 of the Constitution of India, having self imposed restrictions can only be exercised in exceptional or a compelling situation in cases where there is violation of fundamental rights, there is gross violation of principal of natural justice or the proceeding or the order are without jurisdiction, as has been held by the Hon'ble Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors., reported in (1998) 8 Supreme Court Cases 1. Paragraph 15 reads as follows"

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bare in at least three contingencies, namely, where the Writ Petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

Hence the order of the Managing Director of the Corporation is not sustainable since there is no provision of recovery from a retired employee and as such, the order was contrary to the regulation 21 of the Regulation, 1958. Hence, in the present case there is no question of the alternative remedy being available under Regulation 25 of the Regulation, 1958. The order of recovery, being passed without considering the fact that the respondent no. 3 has been exonerated in a duly constituted departmental proceeding and he has still not been convicted for the criminal charge, was absolutely without jurisdiction.

In view of the discussions made above, we do not find any merit in the appeal.

Accordingly, the present Letters Patent Appeal is dismissed.

(Dinesh Kumar Singh, J)

(Anil Kumar Sinha, J)

sanjeev/-Anil/

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	
Transmission Date	