IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2590 of 2017

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Sudhir Kumar Jha S/o Sri Rabindra Nath Jha Resident of Village-illage-Pandaul, P.O.-Pandaul, District-Madhubani.At Present Superintendent of Excise, Bhabhua, Kaimur, Department of Excise and Prohibition, Government of BIhar, Patna

... ... Petitioner/s

Versus

1. The State Of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The principal Secretary, Department of Excise and Prohibition, Government of Bihar, Patna
3. The Commissioner, Department of Excise, and Prohibition, Government of Bihar, Patna.
4. The Joint Commissioner-cum-Department Enquiry Officer, Department of Excise and Prohibition, Government of Bihar, Patna.
5. The Deputy Commissioner, Magadh-cum-Patna Division, Department of Excise and Prohibition, Government of Bihar, Patna.
6. The Section officer-Cum-Presenting Officer, Gazetted Complaint Section-08, Department of Excise and Prohibition, Government of Bihar, Patna.
7. The District Magistrate, Aurangabad.
8. The Bihar Public Service Commission through its Secretary, Bailey Road, Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr.Krishna Chandra, Adv.
For the Respondent/s : Mr.P.N. Shahi- AAG 6

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CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
C.A.V. JUDGMENT
Date: 17-05-2019

The present writ petition has been filed for quashing the order contained in Memo No. 3865 dated 12.87.2016 whereby and wherunder the petitioner has been dismissed from service.

2. The brief facts of the case are that the petitioner was at the relevant time posted as Superintendent of Excise, Aurangabad and pursuant to the direction issued by the

Commissioner of Excise, Bihar, Patna, while discharging the duties entrusted to him, a sale notification was issued under the signature of the then Collector, Aurangabad on 18.2.2013 for settlement of excise shops of Aurangabad district for the financial year 2013-14. The petitioner is said to have assigned the task of fair and complete settlement of the shops, by his letter dated 18.2.2013, to the Excise Inspector, namely, Ashraf Jamal, the Sub-Inspector of Excise namely Ram Naresh Choudhary and four other clerks to collect the applications along with prescribed fee. Thereafter, the prescribed application fee to the tune of Rs. 24,51,000/- was collected and kept in a locked steel box. The said steel box, however, went missing subsequently, whereafter the petitioner had rushed to the office and it was found on enquiry that neither any of the locks of the warehouse were broken nor there was any signs of burglary. Thereafter, the petitioner had informed the Collector regarding the alleged embezzlement of fee amount and then FIR was lodged against the then Sub-Inspector of Excise Shri Ram Naresh Choudhary, who was posted as Warehouse Officer at M/S Maa Tarni Natural Resources Pvt. Limited, a country liquor manufacturing unit cum warehouse, of the Excise Department, Aurangabad. On the basis of the FIR instituted by the petitioner, a case bearing Aurangabad Town P.S. Case No. 90 of 2013 was registered and the case was then investigated whereupon a report was submitted and the case was found to be true as against the aforesaid Shri Ram Naresh Choudhary.

3. The further case of the petitioner is that suddenly a show cause notice was issued to the petitioner vide letter dated 18.3.2013 on the charge of not reporting the aforesaid matter to the headquarter, whereafter the petitioner had filed a reply stating therein that he had immediately informed, in detail, to the Deputy Commissioner, Excise, Patna, Magadh Division as well as to the E.I.B. Inspector on his mobile phone, who had been assigned to take daily report from all the district regarding the settlement of excise shops. Thereafter, the matter appears to have been dropped inasmuch as the petitioner did not hear about any adverse steps having been taken by the department as against him. Subsequently, the aforesaid Ram Naresh Choudhary, Sub Inspector of Excise was put under suspension on the allegation of embezzlement of the application fee and

thereafter a departmental proceeding was initiated against him vide letter dated 4.6.2013 and the petitioner was appointed as the Presenting Officer nonetheless, to the utter surprise of the petitioner, he received a letter dated 8.7.2013 whereby and whereunder a copy of Prapatra- "Ka" was served on the petitioner, however, without any decision of initiation of departmental proceeding. The petitioner had then replied to the said letter dated 8.7.2013. After a lapse of four months, the respondents issued a resolution dated 5.11.2013, under the signature of the Deputy Secretary, Excise and Prohibition Department, Bihar, Patna, by which a decision was taken to initiate a departmental proceeding against the petitioner. The enquiry officer had again served praptra "Ka" on the petitioner vide his letter dated 3.12.2013. The petitioner had thereafter, presented himself before the enquiry officer and submitted his reply. The enquiry officer had then by his order dated 12.12.2013 specifically directed the Presenting Officer to file a written opinion of the department about the reply filed by the petitioner, however, the same was never filed. Subsequently, the enquiry officer and the Presenting Officer were changed vide resolution dt.

26.5.2014.

4. The further case of the petitioner is that suddenly a second show cause notice dated 13.4.2015, annexing the copy of the enquiry report, was served upon the petitioner. The petitioner had then submitted his reply to the second show cause notice vide his letter dated 19.4.2015 whereafter the impugned order dated 12.8.2016 inflicting the punishment of dismissal of the petitioner herein from his services, was passed.

5. The learned Senior counsel for the petitioner, referring to the enquiry report dated 29.09.2014 submitted by the enquiry officer, has submitted that firstly in paragraph-3, a list of three persons has been furnished, who were proposed to be examined on behalf of the prosecution in proof of the charges leveled against the petitioner herein, however, the said three persons have not been examined by the department, as such the present case is a case of no evidence. In this connection, the learned senior counsel for the petitioner has relied upon a judgment reported in (2009)2 SCC 570 [**Roop Singh Negi Vs. Punjab National Bank & Ors**.]. The learned senior counsel has further submitted

that the enquiry officer has nowhere found that the petitioner was responsible for embezzlement of the aforesaid amount of Rs. 24,51,000/- and the enquiry officer, in paragrap-5(v) of the said enquiry report has only stated that since the petitioner was the office head, it was his responsibility to ensure that the Government's revenue has been kept in the strong room in a secured manner, hence the petitioner was found by the enquiry officer to be responsible for administrative failure resulting in loss of government revenue.

6. The learned senior counsel has further referred to the last page of the enquiry report to submit that according to the supervision note of the Deputy Superintendent of Police, Sadar Aurangabad and according to the opinion of the Superintendent of Police, Aurangabad, the complicity of the aforesaid Shri Naresh Choudhary, Deputy Inspector, Excise, and the Manager, Janardan Prasad, Ram Dayal Paswan, Binod Kumar and Chandan Kumar has been found and as far as the petitioner is concerned, no criminal complicity has been found regarding misappropriation of government revenue. Thus, it is the argument of the learned senior counsel that

even the enquiry officer has come to the conclusion that on account of negligence of the petitioner herein, monetary loss has been suffered by the department. It has been further contended by the learned senior counsel that though the charges leveled against the petitioner, as contained in Praptra “Ka” dated 17.06.2017, annexed to the letter of the department dated 08.07.2013, pertains to keeping the amount of application fees in the premises of country made liquor factory-cum-warehouse, instead of keeping the same in the strong room of the treasury, the order of dismissal dated 12.08.2016 is premised on three other charges:-

> (i) Conduct of the petitioner in misappropriation of a sum of Rs. 24,51,000/- during the financial year 2013-14 while he was posted as Superintendent, District Aurangabad.
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> (ii) The petitioner having been found sleeping in his office with his legs on the table.
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> (iii) While posted as Superintendent, Excise, Aurangabad, the petitioner had shown dereliction in duty in the Vidhan Sabha election.

7. The learned senior counsel has further submitted that as far as the disciplinary proceeding initiated vide resolution dated 18.3.2013/ 8.7.2013/5.11.2013 is concerned, the same has been dealt with in the order of dismissal dated 12.8.2016 in paragraph-2 to 11 and in

paragraph no. 10 it has been stated that upon consideration of the enquiry report of the enquiry officer and the clarification/ reply to the show cause notice submitted by the petitioner and on account of want of complete proof, it was decided to impose punishment of withholding of three annual increments and concurrence was also given by the Bihar Public Service Commission, however, the disciplinary authority had reviewed the entire matter, without notice to the petitioner and has taken a decision to inflict the punishment of dismissal in view of the petitioner being held guilty of proved negligence towards discharging his work while posted as office head and for working contrary to the prescribed standard as well as considering the huge loss of revenue. It has been further submitted that the disciplinary authority has come to a conclusion in paragraph-14 of the dismissal order dated 12.8.2016 that from a perusal of the enquiry reports of the two enquiry officers of the ongoing two departmental proceedings, it is clear that all the charges stands proved, however, the fact is that pursuant to passing of the said dismissal order dated 12.8.2016, the petitioner had filed an application under R.T.I. to which the department had replied vide letter dated 5.10.2016 stating that since the petitioner has been awarded the punishment of dismissal in file no. 02-20/2013, the disciplinary proceeding initiated in file no. 02-22/2015 has been kept in abeyance. The learned senior counsel for the petitioner has submitted that firstly, two departmental proceedings could not be clubbed for the purposes of passing of the impugned order of dismissal dated 12.8.2016 and secondly, as far as the second departmental proceeding, wherein two charges have been leveled against the petitioner herein is concerned, the petitioner is not aware of the enquiry officer having submitted any enquiry report inasmuch as neither any enquiry report nor any second show cause notice has been served upon the petitioner till date and in fact, the R.T.I. reply by the department vide letter dated 5.10.2016 also shows that the said second departmental proceeding has been kept in abeyance, hence the order of dismissal dated 12.8.2016 has been passed in a most arbitrary and perfunctory manner without there being any material on record to show the guilt of the petitioner as far as the second departmental proceeding is concerned, hence on this ground alone, it is submitted that the order of punishment dated 12.8.2016 is fit to be set aside. It is further submitted that the order of punishment dated 12.8.2016 has been passed without adhering to the principles of natural justice and without granting any opportunity to the petitioner to present his side of the case before the disciplinary authority. It is the further contention of the learned senior counsel that though the departmental proceeding in question has been initiated only on a single allegation, however, the disciplinary authority, while passing the impugned order dated 12.8.2016, has travelled beyond the charges leveled against the petitioner and considered extraneous materials for the purposes of inflicting punishment of dismissal, as such the order of dismissal dated 12.8.2016 is fit to be set aside.

8. The learned senior counsel, referring to paragraph-38 of the writ petition, has further contended that the petitioner has obtained the entire file pertaining to the departmental enquiry in question under Right to Information Act and from a perusal of the same it is clear that when the department had re-sent the file to the Bihar Public Service Commission for obtaining its consent on the fresh proposal of

punishment of dismissal, the B.P.S.C. had given a dissent opinion and returned the file. However, since the authorities were bent upon to dismiss the petitioner from his services, they had arbitrarily and in a perverse manner added two more charges to ensure passing of the dismissal order. It is further submitted that no show cause notice has been given to the petitioner on the issue of enhancing the quantum of punishment from withholding of three annual increments with cumulative effect to the punishment of dismissal from service, hence the order dated 12.8.2016 is contrary to the principles of natural justice. Lastly, it is submitted that neither any list of witnesses nor any documentary evidence were ever supplied to the petitioner in order to prove the articles of charges, even though the petitioner presented himself on duty every day and fully cooperated in the departmental proceedings by filing reply/ documents and naming the witnesses in his reply, but not even a single sitting was held on the date fixed, during the entire departmental proceeding to prove the charges, as against the petitioner herein which fact stands substantiated from the chart of events produced by the petitioner in the second supplementary affidavit filed before this Court, which is reproduced herein below:-

DATES	PROCEEDING	REMARK
08.07.2013	'PRAPATRA K' was issued to petitioner vide letter no.- 4669	Filed reply on 22.07.2013
05.11.2013	Decision taken to initiate departmental proceeding vide memo no.-3576. Enquiry Officer (E.O) and Presenting Officer appointed.	
03.12.2013	Vide memo no.-4029 E.O directed petitioner to file reply to PRAPATRA 'K'.	Next date fixed for 12.12.2013 .
12.12.2013	Petitioner appeared and again filed reply to Prapatra 'K' and a copy of which was served to Presenting Officer. Vide order contained in memo no.-4307, E.O directed Presenting officer to file reply/stand of the department.	Petitioner again filed reply to Prapatra 'K'. Next date fixed for 13.01.2014
13.01.2014	No proceeding conducted as E.O went on long leave.	
26.05.2014	Vide memo no.-2174, both E.O and Presenting officer were changed.	
10.06.2014	Again a copy of same Prapatra 'Ka' was served and Presenting officer was directed to file the stand of the department.	Next date fixed for 18.06.2014
18.06.2014	No proceeding as the E.O was transferred.	
15.07.2014	Again the earlier E.O namely Sri Navin Kr. Mishra was reappointed as E.O.	
28.08.2014	Intimated the petitioner with respect to his reappointment as E.O.	Next date fixed for 05.09.2014
05.09.2014	Petitioner sent a request letter dated	Next date

	04.09.2014 informing the E.O about his engagement in an important meeting called upon by the District Magistrate, Kaimur.	fixed for 08.09.2014 .
08.09.2014	Petitioner appeared but no proceeding.	
29.09.2014	E.O submitted his enquiry report without proper sittings as well as without there being any oral or documentary evidence led by the Presenting officer/ department	
13.04.2015	Second show-cause vide letter no.-1706	
19.04.2015	Reply to second show-cause.	
12.08.2016	Dismissal Order passed vide memo no.-3865.	

9. It is also the submission of the learned senior counsel for the petitioner that the main accused in the present case namely Shri Ram Naresh Choudhary, Sub Inspector of Excise, against whom FIR was lodged for misappropriation of a sum of Rs. 24,51,000/- and the police has also submitted a charge sheet against him in the said criminal case, finding the criminal case to be prima facie true as against him, has been left off lightly by imposing a punishment of holding of 30% pension whereas the petitioner, who is admittedly nowhere involved in misappropriation of money has been awarded punishment of dismissal from service, which is out rightly discriminatory. It is

also submitted that in any view of the matter, the punishment awarded to the petitioner is disproportionate to the charges leveled against him.

10. Per contra, the learned counsel for the respondents has reiterated the facts and circumstances of the case, leading to the initiation of the departmental proceeding in question pertaining to the negligence of the petitioner in securing the amount of application fee resulting in loss of revenue to the department. It is further submitted that apart from the departmental enquiry in question, initiated vide show cause notice dated 18.3.2013/ 08.07.2013/ 05.11.2013, one another departmental enquiry was initiated vide resolution dated 17.3.2016, regarding violation of the provisions of the 'Representation of Peoples' Act as well as dereliction in duty and violation of Rules 3(1) (ii) and Rule 3(3) of the Bihar Government's Servants Conduct Rules, 1976 wherein the enquiry report was submitted on 11.7.2016, in which the allegations were found to have been proved as against the petitioner herein. At this juncture, it may be relevant to point out that the respondents have failed to show that the enquiry report pertaining to the second departmental proceeding

initiated vide resolution dated 17.3.2016 or a second show cause pertaining to the same was ever served upon the petitioner herein. Nonetheless, it has been submitted that reply of the petitioner was considered and thereafter, the order of dismissal from service dated 12.8.2016 has been passed by the disciplinary authority.

11. At this juncture, it may be pertinent to mention here that the respondents have replied to the averments made in paragraph Nos. 37 to 56 of the writ petition in paragraph No. 26 of the counter affidavit, however, paragraph No. 38 of the writ petition has neither been rebutted nor contradicted hence the averments made in paragraph 38 of the writ petition are accepted to be correct to the effect that there is no concurrence of the Bihar Public Service Commission as far as the passing of the order of dismissal dated 12.8.2016 is concerned.

12. It has been further submitted by the learned Counsel appearing for the respondents that the disciplinary authority has followed the prescribed procedure in conducting the departmental proceeding and passing the final order, as such this Court is not required to sit in appeal over the decision

of the disciplinary authority and review the decision on merits by re-appreciating the evidence.

13. I have heard the learned counsel for the parties and perused the materials on record and at the very out-set I find that the procedure adopted by the disciplinary authority is unknown to law inasmuch as though, the disciplinary authority had issued second show cause notice dated 13.04.2015 pertaining to the disciplinary proceedings initiated against the petitioner herein vide resolution no. 3576 dated 05.11.2013, but while passing the order of punishment of dismissal dated 12.08.2016, the disciplinary authority has clubbed two more charges, which were not a part of the Prapatra-Ka issued to the petitioner pertaining to the departmental proceedings initiated vide letters/ resolution dated 18.3.2013/ 8.7.2013/ 5.11.2013, hence the order of punishment dated 12.8.2016 is liable to be set aside on the said ground alone. This Court further finds that as far as the departmental proceedings initiated vide resolution dated 5.11.2013 is concerned, wherein allegation has been levelled against the petitioner of having a complicity in embezzlement of a sum of Rs. 24,51,000/-, the same also stands vitiated

inasmuch as admittedly, the enquiry report dated 29.09.2014, is first of all is based on no evidence, since neither any witness was produced by the prosecution i.e. the department nor any documents in support of the allegation were exhibited by the Presnting Officer nor he had filed any written opinion of the department on the reply filed by the petitioner. Reference, in this regard be had to a judgment rendered by the Hon'ble Apex Court in a case reported in (2010) 2 SCC 772 [**State of Utter Pradesh & Anr. vs. Saroj Kumar Sinha**], paragraphs 28 and 29 whereof are reproduced herein below:-

> "28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.
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> 29. Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee".

14. Thus, it is clear that the present case is squarely covered by the judgment rendered by the Hon'ble

Apex Court in the case of **Saroj Kumar Sinha** (supra), hence the entire enquiry as also the enquiry report dated 29.09.2014 stands vitiated and cannot be taken into consideration to conclude that the charges levelled against the petitioner have been proved, specially in absence of any oral evidence having been examined or any documents having been proved in support of the charges. Another aspect of the matter is that even though, the enquiry officer in his enquiry report dated 29.09.2014 has stated that as per the supervision note of the Deputy Superintendent of Police, Sadar, Aurangabad as also according to the opinion of the Superintendent of Police, Aurangabad, the complicity of one Shri Ram Naresh Choudhary, Sub- Inspector of Excise and Manager, Janardan Prasad, Ram Dayal Paswan, Binod Kumar and Chandan Kumar have been found, and as far as the petitioner is concerned, the Investigating Officer as well as the Superintendent of Police, in their supervision note have not found any complicity of the petitioner in the embezzlement of Government revenue, but still the enquiry officer concluded that there was negligence on the part of the petitioner and since he was the head of the office, he has failed in his duties, hence is guilty. It is, therefore, apparent that even the enquiry officer has not found any evidence to connect the petitioner with the embezzlement of the Government revenue to the tune of Rs. 24,51,000/- as alleged in the memo of charges.

15. Yet another aspect of the matter is that the chart of events produced by the petitioner in the second supplementary affidavit filed before this Court, as reproduced herein above, in the preceeding paragraphs, clearly show that the enquiry report was submitted by the enquiry officer without actually conducting any enquiry proceeding as also without either examining any witnesses or taking on record any documentary evidence with a view to establish the verasity of the charges levelled against the petitioner herein, which might be on account of non-production of the witnesses/ documents by the prosecution i.e. the Presenting Officer of the respondent department. In such view of the matter, it is held that the enquiry report submitted by the enquiry officer on 29.09.2014 is a nullity in the eyes of law and the same cannot be taken into consideration to conclude that the charges have been proved against the petitioner herein. Consequently, the second show cause notice based on perfunctory enquiry report dated

29.9.2014 also falls to the ground inasmuch as the said second show cause notice dated 13.4.2015 is solely based on the aforesaid enquiry report dated 29.9.2014, hence is set aside. As a consequence of the enquiry report dated 29.9.2014 being held to be a nullity in the eyes of law as also the second show cause notice dated 13.4.2015 having been quashed, herein above, the order of punishment dated 12.8.2016, based on the aforesaid two documents cannot survive and is, accordingly, set-aside.

16. Yet another reason for quashing of the order of punishment dated 12.8.2016 is that the disciplinary authority, in an illegal manner, as also contrary to the procedure known to law, has clubbed one other disciplinary proceeding said to have been initiated vide resolution dated 17.3.2016, pertaining to two additional charges i.e. regarding the petitioner having been found sleeping in his office keeping his legs on the table and while being posted as Superintendent, Excise, Aurangabad, the petitioner is said to have shown dereliction of duties in the Vidhan Sabha election. As far as the second disciplinary proceedings initiated vide resolution dated 17.3.2016 is concerned, admittedly, not rebutted by the respondents,

neither the enquiry report nor the second show cause notice has ever been served upon the petitioner herein, hence, the entire disciplinary proceeding emanating from the resolution dated 17.3.2016 is illegal, thus is quashed. In this regard it may be relevant to point out that the petitioner had obtained the position of the disciplinary proceeding, initiated vide resolution dated 17.3.2016, under the Right to Information Act and the department has replied that since the petitioner has stood dismissed in an another proceeding, the said proceedings emanating out of resolution dated 17.3.2016, has been kept in abeyance.

17. Another issue which merits consideration in the present case is that though initially punishment of withholding of three annual increment with cummulative effect was sought to be inflicted upon the petitioner herein to which Bihar Public Service Commission had also concurred but latter on upon review of the entire matter it was decided that the punishment should be enhanced in view of the seriousness of the charges and the revenue loss caused to the Government and, accordingly, it was proposed to inflict the punishment of dismissal upon the petitioner herein, however, prior to such

enhancing of the quantum of punishment, the disciplinary authority has passed the impugned order dated 12.8.2016, without adhereing to the principles of natural justice and without granting any opportunity to the petitioner to present his side of the case as far as enhancement of the quantum of punishment is concerned, thus on this score as well, the order of punishment dated 12.8.2016 is bad and fit to be quashed.

18. Last but not the least, it might be relevant to mention here that the main accused namely, Ram Naresh Choudhary, Sub-Inspector of Excise, against whom FIR was lodged for misappropriation of a sum of Rs.24,51,000/- and the police has also submitted a charge sheet against him in the said criminal case, finding the criminal case to be prima facie true as against him, has been left off lightly in the departmental proceedings initiated against him and punishment of withholding of 30% pension has only been imposed which clearly shows the discrimination meted out to the petitioner herein, as far as the quantum of punishment is concerned, though the complicity of the petitioner in the alleged occurrence has neither been found to be present by the police, nor has been proved during the course of the connected

disciplinary proceeding.

19. Having considered the facts and circumstances of the case and for the reasons mentioned herein above, the writ petition is allowed and the enquiry report dated 29.9.2014, second show cause notice dated 13.4.2015 and the order of punishment dated 12.8.2016 are set aside.

20. Now, coming to the issue of back wages it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court, reported in **(2013) 10 SCC 324 (Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya & Ors.),** paragraphs No. 38 to 38.7 whereof are reproduced herein below:-

> "38. The propositions which can be culled out from the aforementioned judgments are:
> 38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.
> 38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.
> 38.3. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court

of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages.

However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back Patna High Court CWJC No.10505 of 2003 dt. 29-06-2018 11/ 12 wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages. 38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality

> given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in Hindustan Tin Works (P) Ltd. v. Employees 7.
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> 38.7. The observation made in J.K. Synthetics Ltd. v. K.P. Agrawal5 that on reinstatement the employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three- Judge Benches7,8 referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman".

21. Thus, in cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule. It is also a trite law that onus lies on the employer to specifically plead and prove that the employee was gainfully employed, which the respondents in the present case have failed to do so. Another factor to be considered is that in case the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of

victimizing the employee or workman, then the court concerned will be fully justified in directing payment of full back wages. I find that the present case is a case of gross injustice meted out to the petitioner herein by the respondents and the materials on record sufficiently demonstrates that the principles of natural justice has been given a go by and the petitioner has been victimized, as such I am of the view that as a consequence of quashing of the enquiry report, second show cause notice and the order of punishment, the petitioner is entitled for full back wages along with all other admissible consequential benefits.

22. The writ petition stands allowed with a direction to the respondent- authorities to pay the back wages along with the admissible consequential benefits within a period of twelve weeks from today.

(Mohit Kumar Shah, J)

Tiwary/-

AFR	AFR
CAV DATE	23.04.2018
Uploading Date	
Transmission Date	N/A