

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.890 of 2018

In
Civil Writ Jurisdiction Case No.14145 of 2014

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Dr. Siyaram Roy, Son of Sri Kedar Nath Roy, Resident of Village-Bagar, P.S.-
Sikrahatta, District-Bhojpur (Bihar).

... .. Petitioner/Appellant

Versus

1. The State of Bihar through the Principal Secretary, Department of Health,
Government of Bihar, Patna.
2. The Principal Secretary, Department of Health, Govt. of Bihar, Patna.
3. The Secretary, Department of Health, Govt. of Bihar, Patna.
4. The Additional Secretary, Finance (Personnel Claim Cell) Department,
Govt. of Bihar, Patna.
5. The Joint Secretary, Health Department, Govt. of Bihar, Patna.
6. The Director-in-Chief, Health Services, Govt. of Bihar, Patna.
7. The Civil Surgeon-Cum-Chief Medical Officer, Begusarai.

... .. Respondents/Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Harnedra Prasad Singh, Advocate Mr. Santosh Kumar, Advocate
For the Respondent/s	:	Mrs. Shama Sinha, AC to AAG-IX

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 27-03-2019

Re.: Interlocutory Application No.5625 of 2018

Heard learned counsel for the appellant and learned
counsel for the respondents.

The cause shown is sufficient. The delay is condoned.

The appeal shall be treated to be within time.

Interlocutory Application stands disposed of.



Re.: L.P.A. No. 890 of 2018

Heard learned counsel for the appellant and learned counsel for the respondents in this appeal that questions the correctness of the impugned judgement of the learned Single Judge.

The challenge raised in the writ petition is to the dismissal order dated 22nd of April, 2013 passed by the Department of Health, Government of Bihar holding the appellant to be guilty of the charge of unauthorized absence after having been transferred.

The case has a chequered history. The appellant had been earlier dismissed from service on 4th of June, 2009 on the same charge. He challenged the said order in C.W.J.C. No. 8107 of 2009. The said writ petition was ultimately allowed and the dismissal order was quashed holding that the entire procedure of the enquiry was vitiated as being in violation of principles of natural justice. The appellant was found to have not been given a fair and adequate opportunity, and after recording this finding a learned Single Judge of this Court came to the conclusion that the dismissal order deserves to be set aside and further liberty was granted to the respondents to proceed against the appellant afresh from the stage of framing of charge, if necessary by



framing a fresh charge also, and then give a reasonable and fair opportunity to defend his case, file a reply and explain his conduct. It is only thereafter, the orders could be passed. The said judgement dated 8th of November, 2010 is reproduced hereinunder:-

“Learned counsel appearing for the Accountant General, Bihar, Patna, submits that Accountant General is neither a necessary party nor a proper party in this case and, therefore, he should be deleted from the array of respondents.

After hearing learned counsel for the parties, this Court is satisfied that the Accountant General is not a necessary party in this case.

Let the name of Accountant General, Bihar be treated as expunged from the cause title.

Petitioner has filed this writ application challenging a resolution of the Government contained in Memo No.400 (9) dated 4.6.2009, annexed as Annexure-10 with the writ application, by which, pursuant to a departmental inquiry, he has been terminated from service. The preliminary challenge of the petitioner to his dismissal order are contained in his pleadings from paragraphs 17 to 24. In a nut shell, he challenges that after service of the memo of charges on him, and after he filed his reply dated 18.3.2005, which was received by the inquiry officer on 21.3.2005, he was never asked to appear in the departmental inquiry and was never asked to produce his evidence in defence of his case and, in fact, no inquiry was held at all, even ex parte, before submission of the report. Till date, as



pleaded, the petitioner has not been suspended. Still, neither he has been paid his salary nor any subsistence allowance till now, even of the period prior to his said dismissal. It is stated that, after submission of his reply dated 18.3.2005, petitioner straightaway received a second show cause notice with the inquiry report, to which he replied through Annexure-9, where after, the impugned order of dismissal was passed against him.

The ground of dismissal from service was that he was absent from service for more than five years, as, after his transfer from Additional Primary Health Centre, Sokahara, Barauni, by order dated 31.12.1993, he never joined his transferred place, namely, Referral Hospital, Madhupur, Deoghar. Hence, petitioner's unauthorized absence of more than 11 years from his duty clearly made out a case of his dismissal from service in terms of Rule 76(b) of Bihar Service Code.

Noticing the stand of the petitioner, and the statements made on oath, this Court, by order dated 13.9.2010, directed the learned State Counsel to seek instructions in respect of the same and file further counter affidavit, as the earlier counter affidavit filed in this case did not meet the stand of the petitioner.

In compliance to the said order, a supplementary counter affidavit has been filed today in which it has been stated that the records pertaining to the departmental proceeding held against the petitioner are not available in the Department and, despite best efforts, the same has not been traced out till now. It is stated that respondents are contemplating appropriate action against the persons concerned responsible for disappearance of the file.



However, in the supplementary counter affidavit, no collateral evidence, even, has been produced to show that in the departmental proceeding any date was fixed and the petitioner was asked to appear before the inquiry officer and to lead evidence.

Learned counsel for the State has submitted that, after Resolution of the department dated 2.3.2005 was issued appointing one Pandey J.K.Sahay, Deputy Secretary, as an inquiry officer along with the charge memo, copy of which was sent to the petitioner, the inquiry officer, so appointed, also sent a communication to the petitioner through his letter dated 9.3.2005, as contained in Annexure-6, with a copy of the said Resolution, a charge memo and a list of evidence, requiring him to file his explanation, along with documents in his defence, by 21.3.2005. He submitted that, since the petitioner, in his reply, did not specifically ask for fixing any date in the inquiry, with clear desire to appear in the same to enable him to lead his evidence, the inquiry officer proceeded on the basis of the show cause reply filed by the petitioner and submitted his inquiry report. He submitted that the inquiry report, a copy whereof is Annexure-7, shows that the said show cause was considered by the inquiry officer and he found the language in the reply of the petitioner as indecent and sarcastic. He also noticed in the report that in the reply petitioner had stated that all the documents were in possession of the Department and, therefore, the same was not required to be produced by him. In the circumstance, he rejected the show cause reply of the petitioner and found him guilty of the charge and submitted his report on 5.2.2007



recommending for his dismissal.

The charge memo, sent by the inquiry officer to the petitioner along with his letter dated 9.3.2005, contained in Annexure-6, mentions that the petitioner had failed to join the transferred post and had absented himself from duty for ten years, which clearly made out a case of disobedience of order of the Health Department, Government of Bihar and a case of unauthorized absence, making the petitioner liable for punishment under Rule 76 of the Bihar Service Code. Petitioner sent a detailed reply dated 18.3.2005 which was admittedly received by the inquiry officer on 21.3.2005. From the inquiry report it appears that the petitioner got the said reply filed before the inquiry officer on that day through a messenger. As copy of the said reply was not on record, this Court asked learned counsel for the petitioner to produce a copy of the same. Accordingly he checked in his file and produced a copy which he read out in Court.

From the contents of the reply it does not appear to this court that the petitioner had used indecent and sarcastic language, except at one place where the petitioner has made some comments with regard to an order passed by this Court. This Court also finds that to make out a case of bona fide conduct on his part, petitioner has referred to large number of official documents and correspondence of the Department in his said reply. This Court also finds that the petitioner had offered to appear in the inquiry and had furnished his contact number for the purpose.

The inquiry report does not show that, after receipt of the reply from the petitioner, any date was



fixed and the petitioner was asked to appear before the inquiry officer on so date fixed. Thus, from the records it appears established that no inquiry was held by the inquiry officer after receipt of the reply of the petitioner on 21.3.2005 and, only on the basis of that reply, the inquiry officer submitted his report almost two years after, i.e., on 5.2.2007.

Learned senior counsel for the petitioner submitted that even if the petitioner had not specifically asked for fixing dates in the inquiry for allowing him to appear and to lead his evidence, it was obligatory upon the inquiry officer to fix up a date and proceed with the inquiry only after due notice to the petitioner calling upon him to lead his evidence. He submitted that, even if the petitioner would have absented himself after due notice of the date fixed, it was not open to the inquiry officer to treat the charge as proved automatically by rejecting the reply of the petitioner, without fixing a date and asking the presenting officer to produce evidence in the inquiry and prove the charge. In this context, the learned Senior Counsel has referred to a Judgment of apex Court in the case of State of U.P. and others vs. Saroj Kumar Sinha (reported in (2010) 2 Supreme Court Cases 772) and has particularly relied upon paragraphs 27 to 30 thereof. For convenience, the said paragraphs of the Judgment are extracted as hereinbelow:-

“27. A bare perusal of the aforesaid sub-rule Shows that when the respondent had failed to submit the explanation of the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant des -pite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex



parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.”

“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 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.”

“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.”

“30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service.”

On the strength of the said observations of the Apex Court, as reproduced here-in-above, learned



Senior Counsel submitted that, after petitioner submitted his reply, the inquiry officer was required to initiate the proceeding by fixing up a date, calling upon the petitioner to appear on the date fixed and produce his evidence and then, even if the petitioner would not have appeared, he ought to have proceeded quasi judicially by directing the presenting officer to produce the evidence in support of Department's case. He submits that admittedly, the same has not been done and, even if all records of the Department in respect of the so called inquiry held against the petitioner are not traceable, there is no collateral evidence to even remotely suggest that this procedure was adopted by the inquiry officer. He submitted that, bypassing all mandatory requirements in terms of Article 311(2) of the Constitution of India and Rule 55 of the 1930 Rules, the inquiry officer has straightaway submitted his report.

It may be mentioned here that the departmental proceeding was initiated against the petitioner under Rule 55 of the Bihar Government Servants (classification, control and appeal) Rules, 1930 which lays down a procedure to be followed for awarding major punishment. This rule also provides that if a delinquent denies the charges and is willing to participate in the proceeding, it must be held, date must be fixed and opportunity must be granted to the delinquent to lead evidence in his defence. The denial of the charges and readiness of the delinquent to face the proceeding has to be culled out from his reply to the charges filed by him. A government servant is not expected to be proficient in legal drafting and an



inquiry officer or a disciplinary authority cannot make absence of exact expression in reply of a delinquent an excuse for not complying with the mandatory requirements of law in conformity with principles of natural justice. It is not the exact language used in the show cause reply which is relevant for the inquiry officer, rather it is the intention of the delinquent, which has to be gathered by reading the entire contents of the reply together, to come to a conclusion that the delinquent had accepted his guilt unequivocally and had opted out from participating in the inquiry and, therefore, no inquiry was required to be held. This legal position has been made very clear by the Apex Court in the above quoted paragraphs and does not need further elaboration. **It was not a matter of using indecent language in his show cause reply. It was a matter of legal requirement and compliance of the Principles of Natural Justice by providing fair and adequate opportunity to the petitioner to establish his denial. It was a constitutional requirement to hold a proceeding in which both, the Department, being represented by the presenting officer, as also the delinquent, had to be given fair opportunity to lead evidence in support as well against the charges. This has clearly not been done in this case. Therefore, the order of punishment, as contained in Annexure-10, is clearly violative of Principles of Natural Justice and, therefore, unsustainable.**

Learned counsel for the respondents has submitted that admittedly the petitioner absented himself from his duty unauthorizedly since 31.12.1993 till order of punishment was passed against him



dismissing him from service. He submitted that there is no material to justify, to the satisfaction of this Court, absence of this petitioner from his duty for such a long period. Therefore, charge framed against him stands established.

This may be so. But fact is that the petitioner has made an attempt to furnish some explanation, although not very happily worded, in his reply dated 18.3.2005. **Therefore, no presumption can arise with regard to the guilt of the petitioner, without giving opportunity to him to supplement his defence or explanation for such absence. During this period the petitioner was not even suspended. He has not been paid even his salary.** Even if he was dismissed by Annexure-10, no order was passed in respect of his salary etc., to which he may be entitled in law for the period prior to his dismissal. In the inquiry this aspect of the matter is also required to be considered which also has not been done in this case. Since the charge of absence from duty for more than ten years is a serious charge, inviting punishment of removal in terms of Rule 76(b), this Court is not inclined to quash proceeding itself.

However, there is clearly a violation of Principles of Natural Justice in the procedure adopted in the matter, leading to the issuance of order of dismissal of the petitioner, as contained in Annexure-10. The same is, therefore, quashed.

However, liberty is granted to the respondents to proceed against the petitioner afresh from the stage of framing of charge, if necessary by framing a fresh charge also and, thereafter giving him a reasonable and



fair opportunity to defend his case, to file a reply and to explain his conduct and defend his case in a properly held inquiry, and then only pass fresh orders in accordance with law. While passing fresh orders, the respondent shall also consider with regard to the entitlement of the petitioner in respect of his salary of previous period or subsistence allowance as may be admissible to him.

In case the respondents chooses to hold a fresh proceeding, as per the liberty granted herein, it must be concluded within 4 months from the date of receipt/production of a copy of this order, failing which, or on the expiry of the said period of 4 months, and if no fresh orders are passed, the petitioner shall stand reinstated in service with all consequential benefits.

The writ application is thus allowed with the aforesaid observations and directions.”

It appears that instead of proceeding from the stage of charge and holding a fresh enquiry, a show cause was issued and a reply was given by the appellant in response to the said show cause. No enquiry appears to have been undertaken as was contemplated under the judgement of the High Court and an approval was obtained from the Bihar Public Service Commission and straightway the impugned order dated 22nd of April, 2013 has been passed.

The same was assailed before the learned Single



Judge in C.W.J.C. No. 14145 of 2014 and it has been dismissed on the ground that the appellant did not submit his joining after he was transferred on 31st of December, 1993 and, was therefore, unauthorizedly absent, hence the punishment order did not deserve any interference. A refusal was assumed by the learned Single Judge on the part of the appellant to have obeyed the transfer order and on that basis the order of dismissal has been upheld.

In paragraph-30 of the impugned judgement, the learned Single Judge has also noticed that the appellant had adversely commented upon a judgement of the High Court in the year 1995 relating to his transfer matter and, therefore, also he did not deserve any such discretionary relief.

It was further held that since the charge was admitted by him and sufficient opportunity had been granted during enquiry which was avoided by the appellant, therefore, there was no violation of principles of natural justice.

Learned counsel for the appellant Shri Singh submits that the learned Single Judge appears to have not taken notice of the findings already recorded in the previous round of litigation in the judgement extracted hereinabove and therefore, without having appreciated the impact of the said judgment in correct



perspective has unjustifiably come to the conclusion that there was no violation of principles of natural justice.

We entirely agree with this submission of Shri Singh inasmuch as while delivering the judgement on 8th of November, 2010, the learned Single Judge had categorically recorded that there was a clear violation of principles of natural justice inasmuch as no fair and adequate opportunity was provided to the appellant to defend himself and the enquiry was not conducted in the manner as contemplated under the relevant rules and the law laid down by the Hon'ble Apex Court in this regard. We, therefore, find that the issue of violation of principles of natural justice had already been settled by the learned Single Judge in the judgement quoted above which is final between the parties. It was not open, therefore for the High Court again to say that there was no violation of principles of natural justice. To the contrary, the respondent was under a bounden duty to have conducted the enquiry afresh as directed by the High Court which has nowhere been done nor is there any recital to that effect in the impugned order dated 22nd of April, 2013. It is a mechanical reproduction of the alleged charge and a mere recital of the explanation given without any reason as to why the explanation of the appellant was



unacceptable. The impugned order only records conclusion without following the procedure prescribed as directed by the High Court and this aspect has escaped the notice of the learned Single Judge, who, in our opinion, has erroneously opined that there was no violation of principles of natural justice. The learned Single Judge could not have recorded a contrary finding that stood concluded in respect of the earlier enquiry.

The appellant's explanation before the authority runs into several pages. It is correct that at one place he has criticized the judgement of the High Court as strange and ridiculous, but this aspect was also noticed in the earlier round of litigation when the judgement was delivered on 8th of November, 2010. We have already reproduced that part of the order, which is highlighted hereinabove, wherein it has been clearly stated that the appellant does appear to have used certain sarcastic language but the Court held that the issue or the charge to be enquired was not in accordance with the legal requirement of observance of principles of natural justice. In such circumstances, the said issue also stood foreclosed and could not have been made a ground for the dismissal of the writ petition by the learned Single Judge as indicated in paragraph-30 of the impugned judgement.



Apart from this, what we find is that after the judgement was delivered by the High Court on 8th of November, 2010 no enquiry appears to have been conducted within the time prescribed therein and consequently the appellant became entitled for reinstatement but the department did not reinstate him and instead passed the impugned order.

The appellant had filed a contempt application alleging disobedience of the judgement dated 8th of November, 2010 and it appears that in order to save themselves from the action of contempt, the respondent-Health Department passed an order on 5th of February, 2014 much after the impugned dismissal order reinstating the appellant but clarifying that this reinstatement would be only up to the date prior to his fresh dismissal order. It is, therefore, clear that the respondents did not have the least respect for the directions of this Court and it was only after the contempt application was filed that the appellant came to be reinstated long after his second dismissal order. We cannot therefore, approve of the action of the State on any ground nor can the impugned judgement of the learned Single Judge be sustained in the background aforesaid.

We, therefore, allow this appeal and set aside the impugned judgement dated 2nd of May, 2018 and quash the



dismissal order of the appellant dated 22nd of April, 2013. We further direct that the appellant, who now has attained the age of superannuation, shall be entitled to all consequential benefits, including arrears of salary, with effect from the date of the impugned dismissal order and shall also be entitled to all such pensionary benefits and such other benefits to which he may be entitled in law. The respondents shall ensure compliance of the judgement and release all payments to the appellant within three months from the date of production of a certified copy of this order.

Allowed.

(Amreshwar Pratap Sahi, CJ)

(Anjana Mishra, J)

Sunil/-

AFR/NAFR	NAFR
CAV DATE	NA
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