

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18561 of 2011

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ASFAQUE AHMED, S/O Late Akhatar Hussain, R/O Village- Khanpur, P.O.
& P.S. Hathauri, Distt- Muzaffarpur

... .. Petitioner/s

Versus

1. The State of Bihar
2. The Director, Primary Education, Secondary and Adult Education
Department, Government of Bihar, New Secretariat, Patna
3. The District Education Officer, Muzaffarpur, District- Muzaffarpur
4. The District Programme Officer, Establishment, Muzaffarpur, Distt-
Muzaffarpur
5. The Area Education Officer, Bochahan, Anchal- Bochahan, Distt-
Muzaffarpur

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Shashi Bhushan Singh, advocate
For the Respondent/s : Mr. Abhay Shankar Jha, SC-14

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
ORAL JUDGMENT

Date : 09-12-2021

In the instant petition, the petitioner has prayed for the
following reliefs:

“(i) For issuance of an appropriate writ in
the nature of certiorari for quashing the memo No.
5962 dated 15.10.2007 by which the prayer of the
petitioner for accepting his joining has been rejected on
the basis of Rule 76 of Bihar service Code, which has
been declared Ultra-vires, in the year 1973 by the
Division Bench of this Hon’ble Court in judgment
reported in AIR 1973 Patna 431, and rule 76 of Bihar
Service Code has been substituted by 311(2) of the
Constitution of India and in this case not even show
cause notice has been issued followed Article 311(2) of
the Constitution of India.



(ii) For issuance of an appropriate writ in the nature of Mandamus Commanding and directing the respondent authority to fix the pension of the petitioner keeping in view of length of service initial date of appointment i.e. from 29.3.74, since the petitioner has attained the age of superannuation as on 31.10.2008 and a direction to the concerned authorities to make payment of retiral dues under different heads and other dues.”

2. The petitioner filed C.W.J.C. No. 8632 of 2006, which was disposed of on 11.02.2011 with the following orders:

“Heard learned counsel for the petitioner and the State.

Counter affidavit has been filed on behalf of the State appending therewith a decision of the Government that since the petitioner absented himself for more than five years without any authorization, he stands terminated from service and, thus, his request for joining has been refused.

Learned counsel for the petitioner seeks permission to withdraw this writ application to challenge the order dated 15.10.2007 by filing a properly constituted writ application.

Permission is accorded.

This writ application is dismissed as withdrawn with the aforesaid liberty.”

3. Alleged allegation is levelled against the petitioner that he absented on unauthorized leave for a period of five years.



However, disciplinary proceeding has not been initiated and concluded for alleged unauthorized absence or misconduct.

4. On this short ground, the impugned order of termination stands set aside. The respondents are at liberty to initiate proceeding and complete within three months from the date of receipt of this order, failing which the petitioner is entitled to all consequential benefits, as if he retired on 31.10.2008 without any penalty. Disciplinary Authority is directed to take note of the decision of the Apex Court in the case of **Chairman-cum-Managing Director, Coal India Ltd. & Ors. Vs. Ananta Saha & Ors**, reported in (2011) 5 SCC 142 (para 46 to 50) for the purpose of regularizing intervening period if any. Paragraph 46 to 50 reads as under:

46. In the last, the delinquent has submitted that this Court must issue directions for his reinstatement and payment of arrears of salary till date. Shri Bandopadhyay, learned Senior Counsel appearing for the appellants, has vehemently opposed the relief sought by the delinquent contending that the delinquent has to be deprived of the back wages on the principle of “no work—no pay”. The delinquent had been practising privately i.e. has been gainfully employed, thus, not entitled for back wages. Even if this Court comes to the conclusion that the High Court was justified in setting aside the order of punishment and a fresh enquiry is to be held now, the delinquent



can simply be reinstated and put under suspension and would be entitled to subsistence allowance as per the service rules applicable in his case. The question of back wages shall be determined by the disciplinary authority in accordance with law only on the conclusion of the fresh enquiry.

47. It is a settled legal proposition that the result of the fresh enquiry in such a case relates back to the date of termination. The submissions advanced on behalf of the appellants that the result of the enquiry in such a fact situation relates back to the date of imposition of punishment, earlier stands fortified by a large number of judgments of this Court and particularly in *R. Thiruvirkolam v. Presiding Officer* [(1997) 1 SCC 9 : 1997 SCC (L&S) 65 : AIR 1997 SC 633] , *Punjab Dairy Development Corpn. Ltd. v. Kala Singh* [(1997) 6 SCC 159 : 1997 SCC (L&S) 1434 : AIR 1997 SC 2661] and *Graphite India Ltd. v. Durgapur Projects Ltd.* [(1999) 7 SCC 645].

48. In *ECIL v. B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704 : AIR 1994 SC 1074] and *Union of India v. Y.S. Sadhu* [(2008) 12 SCC 30 : (2009) 1 SCC (L&S) 126 : AIR 2009 SC 161] , this Court held that where the punishment awarded by the disciplinary authority is quashed by the court/tribunal on some technical ground, the authority must be given an opportunity to conduct the enquiry afresh from the stage where it stood before the alleged vulnerability surfaced. However, for the purpose of holding fresh enquiry, the delinquent is to be reinstated and may be put under suspension. The question of back wages, etc. is



determined by the disciplinary authority in accordance with law after the fresh enquiry is concluded.

49. The issue of entitlement of back wages has been considered by this Court time and again and consistently held that even after punishment imposed upon the employee is quashed by the court or tribunal, the payment of back wages still remains discretionary. Power to grant back wages is to be exercised by the court/tribunal keeping in view the facts in their entirety as no straitjacket formula can be evolved, nor a rule of universal application can be laid for such cases. Even if the delinquent is reinstated, it would not automatically make him entitled to back wages as entitlement to get back wages is independent of reinstatement. The factual scenario and the principles of justice, equity and good conscience have to be kept in view by an appropriate authority/court or tribunal. In such matters, the approach of the court or the tribunal should not be rigid or mechanical but flexible and realistic. (Vide U.P. SRTC v. Mitthu Singh [(2006) 7 SCC 180 : 2006 SCC (L&S) 1590 : AIR 2006 SC 3018] , Akola Taluka Education Society v. Shivaji [(2007) 9 SCC 564 : (2007) 2 SCC (L&S) 679] and Balasaheb Desai Sahakari S.K. Ltd. v. Kashinath Ganapati Kambale [(2009) 2 SCC 288 : (2009) 1 SCC (L&S) 372].

50. In view of the above, the relief sought by the delinquent that the appellants be directed to pay the arrears of back wages from the date of first termination order till date, cannot be entertained and is hereby rejected. In case the appellants choose to hold a fresh enquiry, they are bound to reinstate the



delinquent and, in case, he is put under suspension, he shall be entitled to subsistence allowance till the conclusion of the enquiry. All other entitlements would be determined by the disciplinary authority as explained hereinabove after the conclusion of the enquiry. With these observations, the appeal stands disposed of. No costs.

5. The petition stands allowed.

(P. B. Bajanthri, J)

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AFR/NAFR	NAFR
CAV DATE	NA
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