

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.186 of 2020

In
Civil Writ Jurisdiction Case No.13854 of 2016

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Shailendra Kumar Pandey, Son of Mr. Harendra Nath Pandey, at present residing at Road No.1, Rajiv Nagar, P.S.- Rajiv Nagar, P.O.- Keshari Nagar, Patna- 24.

... .. Appellant.

Versus

1. The State of Bihar through the Principal Secretary, Department of General Administration, Government of Bihar, Patna.
2. The Joint Secretary, Department of General Administration, Government of Bihar, Patna.
3. The Additional Secretary, Department of General Administration, Government of Bihar, Patna.

... .. Respondents.

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Appearance :

For the Appellant : Mr. Prabhat Ranjan, Advocate.
For the Respondents : Mr. Prabhat Kumar Verma (AAG-3).
Mr. Saroj Kumar Sharma, AC to AAG-3.

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 29-11-2023

I.A. No.1 of 2020.

Heard I.A. No.1 of 2020 arising out of L.P.A. No.186 of 2020. Respondents have not filed objection to I.A. No.1 of 2020 for condonation of delay. Further taking note of the pleadings in I.A. No.1 of 2020 for condonation of delay of 190 days, we are satisfied with reasons to condone the delay of 190 days. Accordingly, I.A. No.1 of 2020 stands allowed while



condoning the delay of 190 days in filing the present L.P.A.

L.P.A. No.186 of 2020:

2. With the consent of the learned counsel for the respective parties, main matter (L.P.A. No.186 of 2020) is taken up for final disposal.

3. The appellant was holding the post of Deputy Development Commissioner. He was appointed to State Cadre, namely, Bihar State Service Administration. He was placed under suspension on 26.03.2010 on certain alleged allegation. He was subjected to departmental inquiry under Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (for short 'C.C.A. Rules, 2005') on 04.02.2011. The appellant's explanation to the charge memo was not satisfied and it was resulted in holding of departmental inquiry by appointing Inquiring and Presenting Officers. The Inquiring Officer had submitted report to the disciplinary authority. Disciplinary Authority imposed the penalty of stoppage of one increment with cumulative effect, stoppage of promotion till the date of superannuation, censored and not entitled to anything during the period of suspension except the subsistence allowance.

4. Feeling aggrieved by the order of penalty dated



18.09.2014, the petitioner filed C.W.J.C. No.13854 of 2016 in assailing the penalty order. The learned Single Judge set aside the punishment order and remanded the matter to the Inquiring Officer to hold inquiry with regard to charge no.1 only after giving a report of Forensic Science Laboratory to the petitioner and whatever the plea to be taken by him would be considered in accordance with law. It is further ordered that:

“However, it is made clear that the petitioner has already been superannuated from service, so only the proceeding may be initiated under Section 43(b) of the Bihar Pension Rules.”

5. Learned counsel for the appellant submitted that the learned Single Judge has committed error in remanding the matter to hold inquiry insofar as charge no.1 read with initiation of inquiry under Rule 43(b) of Bihar Pension Rules. It is contended that there is no financial loss caused to the State Government. Therefore, question of remanding the matter to hold inquiry under Rule 43(b) of the Bihar Pension Rules is incorrect. It is also submitted that earlier in the inquiry, charge no.1 was not proved. Therefore, question of holding inquiry or remanding the matter to hold inquiry in respect of charge no.1 is not correct. In support of the aforementioned contentions, he



has relied on unamended Rule 43(b) of the Bihar Pension Rules. He has also cited three decisions, namely, (i) 2010 (3) PLJR 845 (Urmila Sharma @ Urmila Singh Vs. The State of Bihar through the Chief Secretary, Government of Bihar, Patna and Ors.), (ii) 2007 (3) BLJR 2972 (Bihar State Electricity Board Versus Sharda Prasad Sinha and Ors.) (paragraph-8), (iii) C.W.J.C. No.17198 of 2014 (Dhirendra Prasad Shrivastava Versus The State of Bihar and others) decided on 17.10.2023 and further relied on decision of L.P.A. No.1682 of 2018 (The State of Bihar and others Versus Kumar Ajit Singh) passed in C.W.J.C. No.18055 of 2018 decided on 06.02.2023.

6. Per contra, learned counsel for the respondents-State resisted the aforementioned contentions and submitted that on reading of unamended Rule 43(b), there is an ingredient word 'or'. Therefore, invariably for initiation of inquiry or ordering punishment under Rule 43(b) it is not that there must be pecuniary loss caused to the State exchequer. The other materials may also be taken into consideration for the purpose of invoking Rule 43(b). Therefore, there is no infirmity or lacuna in the order of the learned Single Judge so as to interfere and it is fit for rejection of the present L.P.A. by affirming the order of the learned Single Judge.



7. Heard the learned counsel for the respective parties.

8. The appellant was charged for the following article of charges:

(I) The CD, which was handed over by the Divisional Commissioner, Tirhut Division, Muzaffarpur, shows his involvement in the sexual activities, which is contrary to the provision of Bihar Government Servant Conduct Rules, 1976.

(II) In his office, he has tortured Vriksha Ram, Head Clerk-cum-Accountant and for such misbehaved, a criminal case was lodged vide Case No.632/2009 under the provisions of Scheduled Castes and Scheduled Tribes Act. He has also tortured another Scheduled Caste employee, namely, Muneshwar Manjhi by not releasing his salary and for that a criminal case vide Case No.600/09 was also instituted against the petitioner.

(III) Without any information and permission, he always used to remain absent from headquarter and he does not report in the meeting nor informed the authority.

(IV) Under the NAREGA Scheme from the fund of BRGF one computer was purchased and in that purchase he has



not followed the guidelines.

9. The learned counsel for the appellant submitted that the learned Single Judge has committed error in remanding the matter to the disciplinary authority or Inquiring authority to hold inquiry in respect of charge no.1. Charge no.1 was not proved in the earlier inquiry. Therefore, remanding the matter in respect of charge no.1 is incorrect. At this stage, it is necessary to reproduce the order of the learned Single Judge which reads as under:

“Counsel for the petitioner submits that the Authority could not have taken into account the report of CD as the same was not produced during inquiry as he was not given any opportunity to confront and contradict the genuineness of the CD itself. He has further submitted that at the eleventh hour, he was to be promoted to the next grade, but they have hatched conspiracy and made a wrong allegation against the petitioner so that he could not get an opportunity of being promoted in the next grade. He has further submitted that the District Magistrate at the relevant time was not in good relation with the petitioner, and he was the person behind the scene and he has made concocted story against the petitioner. So far as first charge with regard to sexual involvement of the petitioner is concerned, it appears that the



Authority while passing the order taken into consideration the report of the Forensic Science Laboratory without giving an opportunity to the petitioner to confront and contradict about the genuineness of the material and without giving any chance that has been taken into consideration is only basis for inflicting the punishment to the petitioner.”

10. Perusal of the aforementioned submission on behalf of the appellant before the learned Single Judge, he had questioned the charge no.1 also. Therefore, the learned Single Judge has remanded the matter. Of course, there is error committed by the learned Single Judge to the extent of “the proceedings may be initiated under Section 43(b) of the Bihar Pension Rules.” There is error in respect of stating Section 43(b), it should have been Rule 43(b). Further, in the previous paragraph, the learned Single Judge passed the following order:

“In such view of the matter, the impugned order of punishment is set aside for the present and the matter is remanded back to the enquiry officer to hold an inquiry with regard to charge no.1 only after giving a report of Forensic Science Laboratory to the petitioner and whatever the plea has been taken by him will be considered in accordance with law.”



11. These last two paragraphs are contradictory to each other. Therefore, initiation of proceeding under Rule 43(b) of the Bihar Pension Rules is not warranted. In other words, whatever charge no.1 framed by the disciplinary authority and which was inquired into there is lacuna to the extent that the petitioner had not been given an opportunity to peruse the report of the Forensic Science Laboratory. Therefore, question of initiation of inquiry under Rule 43(b) of the Bihar Pension Rules insofar as charge no.1 is concerned is not warranted. To that effect the order of the learned Single Judge is modified and disciplinary authority is directed to commence the inquiry based on the charge no.1 framed earlier on 04.02.2011.

12. In the present L.P.A., learned counsel for the appellant submitted that there is no financial loss caused by the appellant so as to warrant or invoke Rule 43(b) of the Bihar Pension Rules. It is necessary to reproduce Rule 43(b) (Unamended) which reads as under:

“43(b). The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pensioner of the whole or part of any pecuniary loss caused to Government, if the pensioner is



found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement:

Provided that.-

(a) Such departmental proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment,

(i) shall not be instituted save with the sanction of the State Government;

(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings; and

(iii) shall be conducted by such authority and in such place or places as the State Government may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made;

(b) judicial proceedings, if not instituted while the Government servant was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c) the Bihar Public Service Commission shall be consulted before final orders are passed.

Underline Supplied



13. Reading of the aforementioned Provision, it is crystal clear that for taking any action under Rule 43(b), it is not mandatory that there should have been financial loss caused to the State exchequer even otherwise action could be taken under Rule 43(b) having regard to the language employed 'or' - . In support of the aforementioned contentions, learned counsel for the appellant cited four Judgments cited supra. All the four Judgments are distinguishable in view of the fact that there is no interpretation of Rule 43(b) of Bihar Pension Rules (unamended Rule). In fact order dated 06.02.2023 passed in L.P.A. No.1682 of 2018 is distinguishable on factual aspect of the matter. In that case, respondent Kumar Ajit Singh was punished under Rule 43(b) on the fact that there was financial loss caused to the State exchequer to the tune of Rs.3.5 Lakhs. However, there was no discussion or analysis as to how the inquiring authority/ disciplinary authority had come to the conclusion that determination of financial loss to the tune of Rs.3.5 lakhs. Therefore, the aforementioned decision is not applicable to the case in hand.

14. So far as reported decisions 2010(3) PLJR and 2007 (3) BLJR are concerned, the coordinate Bench has not interpreted unamended Rule 43(b) of Bihar Pension Rules.



Therefore, we have to hold that the two decisions cited (reported) are judgments in per incuriam.

15. The Apex Court in the case of **DIVISIONAL CONTROLLER, KSRTC vs. MAHADEVA SHETTY & ANOTHER** reported in **(2003)7 SCC 197**, in paragraph-23, it is held as under:

“**23.** So far as Nagesha case [(1997) 8 SCC 349] relied upon by the claimant is concerned, it is only to be noted that the decision does not indicate the basis for fixing of the quantum as a lump sum was fixed by the Court. The decision ordinarily is a decision on the case before the court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. Therefore, while applying the decision to a later case, the court dealing with it should carefully try to ascertain the principle laid down by the previous decision. A decision often takes its colour from the question involved in the case in which it is rendered. The scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are distinguished as obiter dicta and are not authoritative. The task of finding the principle is fraught with difficulty as



without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made as a measure of social justice. Precedents sub silentio and without argument are of no moment. Mere casual expressions carry no weight at all, nor every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement having the weight of authority.”

16. Ingredient with the Judgment per incuriam as quoted by Sir John Salmond in his ‘Treatise on jurisprudence’ has aptly stated the circumstances under which a precedent can be treated as per incuriam. It is stated that a precedent is not binding for which it was rendered in ignorance of a statute or a rule having the force of statute or delegated legislation.

17. In the present case, Rule 43(b) (unamended) has not been taken note of by the coordinate Bench and interpreted whether financial loss alone is the criteria for the purpose of invoking Rule 43(b) (unamended rules) or not. Unamended Rule 43(b) has not restricted that it could be invoked only if there is any financial loss caused to the State Government by employee/Government Servant. On the other hand, if pensioner is found in a **departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary**



loss to Government.

Underline Supplied.

18. The Apex Court in the case of **GOVERNMENT OF ANDHRA PRADESH AND ANOTHER vs. B. SATYANARAYANA RAO** reported in **(2000) 4 SCC 262** observed as under:

“ The Rule of per incuriam can be applied where Court omits to consider a binding precedent of the same Court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.”

19. In the present case, coordinate Bench has not considered the language employed under Rule 43(b) to the extent that it should be invoked only in respect of pecuniary loss caused to the State exchequer or Grave misconduct etc..

20. In **THOTA SHESHARATHNAMMA AND ANOTHER vs. THOTA MANIKYAMMA (DEAD) BY LEGAL REPRESENTATIVES** reported in **(1991) 4 SCC 312**, a two Judge Bench of Apex Court held that Three Judge Bench decision in the case of Mst. KARMI vs. AMRU, (1972) 4 SCC 86 on per incuriam and observed as under.

“..... It is a short judgment without adverting to



any provisions of Section 14(1) or 14(2) of the Act. The Judgment neither makes any mention of any argument raised in this regard nor there is any mention of the earlier decision in Seth Badri Parshad vs Srimati Kanso Devi. The decision in Mst. Karmi cannot be considered as an authority on the ambit and scope of Section 14(1) and 14(2) of the Act.”

21. A decision contrary to law and Rules cannot become precedent as held in the case of **UNION OF INDIA vs S K SAIGAL, (2007)14 SCC 556**. In the matter of **PAISNER VS. GOODRICH reported in (1955)2 All – ER 530** referred in **ICICI Bank Limited and another Vs. The Municipal Corporation of Greater Bombay and others** reported in **AIR 2005 SCC 3315**. In the Paisner’s case Lord Denning in his judgment held as under:-

“When the judges of this Court give a decision on the interpretation of an Act of Parliament, the decision itself is binding on them and their successors. But the words which the judges use in giving the decision are not binding. This is often a very fine distinction, because the decision can only be expressed in words. Nevertheless, it is a real distinction which will best be appreciated by remembering that, when interpreting a statute, the sole function of the court is to apply the words of



the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation; but not in a different situation. Whenever a new situation emerges, not covered by previous decisions, the courts must be governed by the statute and not by the words of the judges.”

(Underline supplied)

22. It is also a trite law that a point not raised before a Court would not be an authority on the said question. In **A-ONE GRANITES vs. STATE OF UTTAR PRADESH, (2001) 3 SCC 537**, it is stated as under:

“This question was considered by the Court of appeal in LANCASTER MOTOR CO. (London) LTD. vs. BREMTH LTD., and it was laid down that when no consideration was given to question, the decision cannot be said to be binding and precedents sub silentio and without arguments of no moment.”

23. In the present case in not taking note of such of those words employed in Rule 43(b) of the Bihar Pension by the coordinate Bench amounts to attracting the principles of sub silentio.

24. In the case of **STATE OF U.P. VS. SYNTHETICS**



AND CHEMICALS LIMITED (1991) 4 SCC 139,

parapraghs 40 and 41 read as under:

“40. ‘Incuria’ literally means ‘carelessness’. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The ‘quotable in law’ is avoided and ignored if it is rendered, ‘in ignoratium of a statute or other binding authority’. (Young v. Bristol Aeroplane Co. Ltd. [(1944) 1 KB 718 : (1944) 2 All ER 293]). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In Jaisri Sahu v. Rajdewan Dubey [(1962) 2 SCR 558 : AIR 1962 SC 83] this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

41. Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. “A decision passes sub-silentio, in the technical sense



that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind.” (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675, 677 : (1941) 2 All ER 11] the Court did not feel bound by earlier decision as it was rendered ‘without any argument, without reference to the crucial words of the rule and without any citation of the authority’. It was approved by this Court in Municipal Corporation of Delhi v. Gurnam Kaur. [(1989) 1 SCC 101] The bench held that, ‘precedents sub-silentio and without argument are of no moment’. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. ShamaRao v. Union Territory of Pondicherry [AIR 1967 SC 1480 : (1967) 2 SCR 650 : 20 STC 215] it was observed, ‘it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein’. Any declaration or conclusion arrived without



application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

The decisions ‘sub-silentio’ and ‘per incuriam’ are not binding. Sub-silentio decisions flow when the particular point of law involved in the decision is not perceived by the Court of present to its mind. A point nor argued or considered by Court is said to pass sub-silentio.”

25. The overall point for consideration is whether the coordinate Bench decision cited is applicable to the petitioner’s case or not? It is to be noted that co-ordinate Bench has not taken note of and interpreted the words used in unamended Rule 43(b) of Bihar Pension Rules. In other words, it is not a single criteria that there were alleged allegations to examine regarding pecuniary loss caused by the employee or a government servant so as to invoke Rule 43(b) (unamended Rules). The other aspects are also warranted for invoking Rule 43(b) in the light of the language employed in the Rule.

26. In view of these facts and circumstances, the present L.P.A. is allowed in part to the above extent.



27. At this stage, learned counsel for the appellant submitted that the appellant's retiral benefits are not being settled due to pendency of inquiry proceedings. Therefore, he is requesting to complete the inquiry within a reasonable period of time. Accordingly, the concerned disciplinary authority / inquiring authority are hereby directed to complete the inquiry insofar as charge no.1 within a period of three months from the date of receipt of this order. It is also clarified that in the event of the then inquiring officer is not available under any circumstances in that event disciplinary authority is permitted to appoint fresh inquiring officer to hold inquiry insofar as charge no.1 which was framed on 04.02.2011, while complying Rule 43(b) of Bihar Pension Rules (unamended).

(P. B. Bajanthri, J)

(Ramesh Chand Malviya, J)

P.S./-

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