

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.752 of 2017
In
Civil Writ Jurisdiction Case No.13559 of 2010

- 1.1. Rekha Kumari @ Rakha Prasad, Wife of Late Dr. Arun Kumar Prasad, Resident of 4H/54, Bhootnath Ashram Road, Bahadurpur Housing Colony, Police Station- Agamkuan, District- Patna- 26.
- 1.2. Dr. Roshani Prasad, Daughter of Late Dr. Arun Kumar Prasad, Resident of 4H/54, Bhootnath Ashram Road, Bahadurpur Housing Colony, Police Station- Agamkuan, District- Patna- 26.
- 1.3. Rashmi Prasad, Daughter of Late Dr. Arun Kumar Prasad, Resident of 4H/54, Bhootnath Ashram Road, Bahadurpur Housing Colony, Police Station- Agamkuan, District- Patna- 26.
- 1.4. Akhil Kumar, Son of Late Dr. Arun Kumar Prasad, Resident of 4H/54, Bhootnath Ashram Road, Bahadurpur Housing Colony, Police Station- Agamkuan, District- Patna- 26.
- 1.5. Dayawati Devi (Mother of the deceased), Wife of Late Dr. Bal Govind Prasad Resident of 4H/54, Bhootnath Ashram Road, Bahadurpur Housing Colony, Police Station- Agamkuan, District- Patna- 26.

... .. Appellant/s

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Medical Education and family Welfare, Government of Bihar, Patna.
2. The Principal Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna.
3. The Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna.
4. The Additional Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna.
5. The Joint Secretary, Department of Health, Medical Education and Family Welfare, Government of Bihar, Patna.
6. The Under Secretary, Department of Health, Medical Education and Indigeneous Medicine, Government of Bihar, Patna.
7. The Deputy Secretary, Department of Health, Government of Bihar, Patna.
8. The Principal, Patna Medical College and Hospital, Patna.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Aditya Narain Singh, Advocate Mr. Sunil Kumar Singh, Advocate Mr. Ajay Kumar Singh, Advocate Mr. Kundan Kumar Sinha, Advocate
For the Respondent/s	:	Mr. S.D. Yadav, AAG-9 Mr. Nagendra Kumar, AC to AAG-9

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT



(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)

Date : 24-02-2023

In the instant LPA, appellant has assailed the order of the learned Single Judge dated 18.01.2017 passed in CWJC No. 13559 of 2010.

2. Deceased-Dr. Arun Kumar Prasad, while working in Patna Medical College and Hospital at the post of Assistant Professor, Nuero Surgery Department, had committed alleged misconduct of remaining on unauthorized absence for which he was placed under suspension on 13.05.2005 while giving effect from 07.02.2005. He had reported back to duty on 06.07.2005. He had requested for leave on 11.07.2005. Thereafter, there was inaction on part of respondents either in accepting or rejecting the same. There was a press notice on 14.01.2006 for which the appellant had responded by submitting application dated 23.01.2006 requesting for leave. Thereafter, there was inaction on the part of the State and once again on 06.03.2006, the appellant submitted another leave application. On the other hand, there was no response and he was subjected to disciplinary proceedings in framing of article of charges and inquiry report was submitted on 25.09.2006 and it was concluded in imposition of penalty of dismissal from service on



04.11.2010. In the meantime, the leave application was rejected on 10.02.2009 after lapse of about three years from the date of his initial leave applications on 11.07.2005, 06.03.2006 and 12.05.2008. During his suspension he had gone abroad, namely, Mozambique and returned on 21.01.2010, reported for duty, however, his duty report was not accepted.

3. The appellant feeling aggrieved by the dismissal order, filed CWJC No. 13559 of 2010. Learned Single Judge proceeded to affirm the order of dismissal while appreciating factual aspects of the matter that deceased-appellant remained on unauthorized absence and had gone abroad and stayed thus, in this regard, learned Single Judge has taken note of some decisions in paragraphs 17, 22 and 24. Further, learned Single Judge has imposed a cost of Rs. 20,000/-.

4. Feeling aggrieved by the order of the learned Single Judge, deceased-appellant Dr. Arun Kumar Prasad filed the present LPA. During pendency of the LPA, he died and legal heirs have been brought on record.

5. Learned counsel for the appellant submitted that the order of dismissal was under Rule 76 of Bihar Service Code. In the event of invoking Rule 76 of Bihar Service code one of the criteria is that any employee who does not resume duty after



remaining on leave for a continuous period of 5 years or where a government servant after expiry of his leave remains absent duty. It is submitted that deceased-appellant did not remain on unauthorized absence for five years so as to invoke Rule 76 of Bihar Service Code. Even though disciplinary proceedings have been initiated and it was almost in the final stage of consideration or reply dated 16.04.2007 to second show cause notice dated 01.03.2007, inquiry officer report, at this juncture Rule 76 of Bihar Service Code has been invoked while imposing penalty of dismissal, which is contrary to legal and factual aspect of the matter and the same has not been appreciated by the learned Single Judge. It is further submitted that the aforesaid submission is a legal issue which is required to be considered by this Court.

6. Per contra, learned counsel for the respondents resisted the contention of the appellant and submitted that there is no infirmity in the disciplinary proceedings initiated against the deceased-appellant and so also order of dismissal passed under Rule 76 of Bihar Service Code. So also the order of the learned Single Judge. At this juncture, learned counsel for the State submitted that Rule 76 quoted in the dismissal order may be by mistake instead of quoting Rule 15 of Bihar Government



Servants (Classification, Contraol & Appeal) Rules, 2005 (for short ' Rules, 2005'). Therefore, impugned order of dismissal is to be treated as passed under Rules, 2005 and not under Bihar Service Code.

7. Heard learned counsels for the respective parties.

8. Deceased-Dr. Arun Kumar Prasad, who was responsible citizens of this country, who has been assigned duty to the post of Assistant Professor in the PMCH. Abruptly he remained on unauthorized absence for some period and the same was noticed by the disciplinary authority and placed him under suspension on 13.05.2005. Thereafter, he was subjected to disciplinary proceedings in framing article of charges and it was concluded in imposition of penalty of dismissal from service under Rule 76 of Bihar Service code.

9. Ordinarily the Court will not interfere in respect of disciplinary proceedings on merits, unless this is perverse evidence. In other words, time and again the Courts have held that Writ Court or any other Court cannot sit over as an appellate authority. Therefore, we are not considering anything on merits. We are only considering legal issues involved in the present case. It is necessary to reproduce Rules 9 and 10 of the Bihar Government Servants (Classification, Contraol & Appeal)



Rules, 2005 for placing under suspension.

“9. Order of Suspension. - (1) *The appointing authority or any authority to which the appointing authority is subordinate or the disciplinary authority or any other authority empowered in that behalf by the Government by general or special order, may place a government servant under suspension when-*

(a) a disciplinary proceeding against the Government Servant is contemplated or is pending, or

under line supplied

(b) in the opinion of the authority aforesaid, the government servant has engaged himself or herself in activities prejudicial to the interest of the security of the State, or

(c) a case against the government servant in respect of any criminal offence is under investigation, inquiry or trial and the competent authority is satisfied that it is expedient to suspend the Government Servant in public interest.

(2) A Government Servant shall be deemed to have been placed under suspension by an order of appointing authority with effect from the following date:-

(a) from the date of his or her detention, if he or she is detained in custody, whether on a criminal charge or otherwise for a period exceeding forty-eight hours;



(b) from the date of his or her conviction, if, in the event of a conviction for an offence he or she is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or compulsorily retired consequent to such conviction.

10. Subsistence allowance during suspension -

(1) A Government Servant under suspension or deemed to have been placed under suspension shall be entitled to receive a subsistence allowance an amount equal to the half average pay and in addition, dearness allowance admissible on such half pay :

Provided that where the period of suspension has exceeded twelve months, the authority, who has made such order of suspension, shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of first twelve months as follows:-

(i) the amount of subsistence allowance may be increased by such a suitable amount, which shall not be exceeding fifty per cent of the subsistence allowance admissible during the period of the first twelve months, if in the opinion of the said authority, the period of suspension has been prolonged for which, for reasons to be recorded in writing, the Government Servant is not responsible.

(ii) the amount of subsistence allowance may be reduced by such a suitable amount which shall not be exceeding fifty per cent of the subsistence allowance admissible during the period of first twelve months, if, in the opinion of the said authority, the period of suspension has been prolonged, for which, for reasons to be recorded in the writing, the Government Servant is responsible.

(iii) the rate of dearness allowance will be based on the rates increased or, the reduced amount, as the



case may be, of subsistence allowance admissible under sub-clause (i) or sub-clause (ii) of this Rule :

Provided further that the Government Servant shall be entitled to receive subsistence allowance only for such period when he is actually present at the headquarters during the suspension period. He shall be required to mark his attendance in the attendance register meant for such Government Servant.

Provided further that since the headquarters cannot be fixed for the period of custody, therefore marking of such attendance shall not be required for the period of custody.

(2) No Government Servant shall be entitled to receive payment under sub-rule (1) unless he furnishes a certificate that he is not engaged in any other employment, business, profession or vocation.

(3) Where suspension is under sub-rule (2) of Rule 9, in that case also the subsistence allowance shall be admissible in accordance with sub-rule (1) above. As a result of deemed suspension due to detention in custody the payment of subsistence allowance may be made to the dependent nominated by the Government Servant on the basis of his authority. Such subsistence allowance shall be paid by the same establishment where the Government Servant was posted at the time of detention.

(4) The disciplinary authority shall be the competent authority to grant subsistence allowance and to increase or decrease the same."

under line supplied

10. It is necessary to reproduce Rule 76 of Bihar Service

Code which reads as under:-

"76. Unless the State Government, in view of the special circumstances of the case, shall otherwise determine, a Government servant, after five years continuous absence from duty, elsewhere than on foreign service in India, whether with or without



leave ceases to be in Government employ.

under line supplied

[(a) No Government servant shall be granted leave of any kind for a continuous period exceeding five years.

(b) Where a Govt. servant does not resume duty after remaining on leave for a continuous period of 5 years, or where a Government servant after the expiry of his leave remains absent from duty, otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him, exceeds a continuous period of 5 years, he shall unless the State Government otherwise determine be removed from service after following the procedure laid down in the Civil Service (Classification, Control and Appeal) Rules, 1930 and the Bihar & Orissa Subordinate Service (Discipline & Appeal) Rules, 1935.]

under line supplied

11. Reading of the aforesaid provision on suspension, it is crystal clear that temporarily there is a seizure of relationship of employer and employee. If an employee is placed under suspension, master and servant relationship continues. In other words, temporarily he would be kept away from the working place. Ordinarily while an employee or a government servant is placed under suspension he need not attend the office on day to day basis. Since object of placing him under suspension is to keep him away from office so as to not interfere with records or win over the relevant witnesses. Therefore, the intervening



period from the date of suspension i.e. 13.05.2005 till imposition of penalty of dismissal from service 04.11.2010 it cannot be treated as unauthorized absence. Question of unauthorized absence of a government servant or employee would arise only as and when he was in service, in other words, he was discharging the duties of the post and remained absent. On the other hand, in the present case deceased officer was placed under suspension and he was prevented from attending the office. Therefore, one cannot draw inference that he remained on unauthorized absence for more than five years during the intervening period from 13.05.2005 to 04.11.2010 during which period, he was under order of suspension. Further, it is to be noticed that Rule 76 of Bihar Service Code does not provide for imposition of penalty of dismissal and it provides for imposition of penalty of removal. These points have not been taken note of by the learned Single Judge.

12. Reading of Rule 10 of Rules, 2005 deals with payment of subsistence allowance during suspension of government servant in which provision provides for government servant is required to mark his attendance in the attendance register meant for such government servant. Further, for payment of subsistence allowance suspended government



servant was required to furnish a certificate that he is not engaged any other employment, business, profession or vacation. It is learnt that deceased-employee has failed to mark his attendance and so also the disciplinary authority in this regard has not issued any communication to the deceased-employee asking him to mark attendance and furnish certificate of non-employment. In the event of government servant who was placed under suspension failed to mark his attendance and failed to furnish non-employment certificate that does not amount to remaining on unauthorized absence. At the best he is not entitled to subsistence allowance during the period of suspension for which period he has not marked the attendance and not furnished non-employment certificate. In other words, above mentioned events are restricted as to only whether suspended government servant is entitled to subsistence allowance or not, since title of Rule 10 of Rules, 2005 is relating to subsistence allowance during suspension. Therefore, presumption of the disciplinary authority that deceased government servant- Dr. Arun Kumar Prasad be treated as unauthorized absence during his suspension period and the same cannot be taken into consideration while invoking Rule 76 of Bihar Service Code.



13. Further, it is noticed that deceased-employee was placed under suspension on 13.05.2005 w.e.f. 07.02.2005 there cannot be retrospectively placing an employee under suspension. Relevant rule does not provide to place an employee or government servant under suspension from the retrospective date. Similarly, while passing order of dismissal on 04.11.2010 deceased-employee has been dismissed from service w.e.f. 07.02.2005. The concerned respondent is not permitted to place government servant or an employee under order of dismissal from retrospective date, since Rules, 2005 or Bihar Service Code do not provide for imposition of penalty of dismissal from service retrospectively.

14. Assuming that placing him under suspension from retrospective date is treated as prospectively and it is curable and similarly, punishment of dismissal from service w.e.f. 07.02.2005 is also curable treating the order of dismissal w.e.f. 04.11.2010, still, imposition of penalty of dismissal under Rule 76 of Bihar Service Code is contrary to the criteria mentioned and factual aspects of the matter. If Rule 76 of Bihar Service Code is to be invoked, only penalty of removal could be imposed. Further no unauthorized absence is attracted as he was placed under suspension and suspension period cannot be



treated as unauthorized absence.

15. In fact on the previous date of hearing we have suggested to modify the penalty of dismissal to that of compulsory retirement w.e.f. 07.02.2005, the date on which he remained absent read with the suspension on 13.05.2005. However, the suggestion made by us was not acceptable to the State Government whereby we are compelled to pass order.

16. It is a case of remand to complete the inquiry proceedings with reference to second show cause notice dated 01.03.2007 read with reply of the deceased employee dated 12.04.2007 while invoking relevant provision of Rules, 2005. However, question of remand to the disciplinary authority is not warranted for the reasons that Assistant Professor-deceased-Dr. Arun Kumar Prasad has died during the pendency of the litigation. Therefore, question of remanding and asking the disciplinary authority to pass orders in terms of Rules, 2005 is not possible. Contention of the Respondent to convert the order of penalty of dismissal under Rules, 2005 is impermissible, since contents of order of dismissal is not with reference to show cause notice, Inquiring Officer report and reply on show cause read with Inquiry Officer report.

17. In the light of these facts and circumstances, the



appellant has made out a, *prima facie*, case so as to interfere with the order of the learned Single Judge dated 18.01.2017 passed in CWJC No. 13559 of 2010 and it is set aside.

18. In the result, order of punishment of dismissal dated 04.11.2010 which has been given effect from 07.02.2005 is set aside while allowing the writ petition filed by the deceased-Dr. Arun Kumar Prasad.

19. The concerned respondent is hereby directed to extend all the monetary benefits which were due to the deceased-Dr. Arun Kumar Prasad to the legal heirs or deceased who were entitled to monetary benefits. The same be settled within a period of three months from the date of receipt of this order.

20. Accordingly, the LPA stands allowed.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

DKS/-
Balmukund/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	03.03.2023
Transmission Date	NA

