

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14619 of 2021

Dr. Hari Shankar Prasad Shrivastwa Son of Late Bhrigunath Prasad, Resident
of Village - Madhopur Tansariya, P.S.- Turkaulia, District - East Champaran.

... .. Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Department of Health and Family welfare, Govt. of Bihar, Patna.
2. The Secretary, Department of Health and family welfare, Govt. of Bihar, Patna.
3. The Joint Secretary, Department of Health and Family Welfare, Govt. of Bihar, Patna.
4. The Deputy Secretary, Department of Health and Family Welfare, Govt. of Bihar, Patna.
5. The Additional Director cum the Enquiry Officer, Health Services, Bihar, Patna.
6. The Branch Officer cum Presenting Officer, Branch - 9, Department of Health, Bihar, Patna.
7. The District Magistrate, Gopalganj.
8. The Deputy Secretary-Cum-Chief Vigilance Officer, Department of Health and Family Welfare, Govt. of Bihar, Patna.
9. The Deputy Director-Cum-Drawing and Disbursing Officer, Department of Health, Govt. of Bihar Patna.
10. The Under Secretary, Department of Health and Family Welfare, Govt. of Bihar, Patna.
11. The Director - In-Chief, Health Service, Govt. of Bihar, Patna.
12. The Regional Deputy Director, Health Service, Chapra.
13. The Civil Surgeon, Gopalganj, District - Gopalganj.
14. The Sub-Divisional Officer, Hathuwa, District - Gopalganj.
15. The In-charge Medical Officer, Referral Hospital, Katiya, Gopalganj.
16. The Treasury Officer, Gopalganj.
17. The Treasury Officer, Secretariat Treasury.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Akashdeep, Advocate Mr. Shashank Chandra, Advocate
For the Respondent/s	:	Mr. Ramadhar Singh, GP-25

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
CAV JUDGMENT

Date :23-02-2024



Heard Mr. Akashdeep, learned counsel, along with Mr. Shashank Chandra, learned counsel for the petitioner and Mr. Ramadhar Singh, learned counsel for the State.

2. The petitioner by filing the present writ petition under Article 226 of the Constitution of India, seeking quashing of the Notification contained in Memo No. 153(9) dated 20.02.2021 (Annexure-21) passed by the Joint Secretary, Department of Health, Government of Bihar, whereby and whereunder the entire gratuity and pension of the petitioner has been withheld on the premise of proved charges that the petitioner while being posted at Primary Health Centre, Katiya, Gopalganj, had irregularly purchased medicines worth Rs. 22,49,493/- from M.S.D., Mumbai. The petitioner further prays for a consequential writ to ensure payment of all the pensionary benefits, including the pension, gratuity, leave encashment, arrears of GPF after granting the benefit of 1st and 2nd ACP and the Central Pay Scale as also to pay the entire salary to the petitioner for the period of suspension from 02.04.1998 to 31.01.2011 after adjusting the subsistence allowance already paid to the petitioner.

3. The short facts as gleaned from the records for adjudication in the matter is that the petitioner was appointed as



Medical Officer on 26.07.1976 and on being transferred to various places, he was posted as In-charge Medical Officer at Referral Hospital, Katiya, Gopalganj. While the petitioner was posted as In-charge Medical Officer, therein, on account of irregularity committed in purchase of medicines at the hands of one Mohan Singh, the then Clerk, an FIR has been instituted against him being Katiya P.S. Case No. 76 of 1996 with an allegation that the accused by forging signature of the petitioner had illegally purchased the medicines worth Rs. 97 lakhs from M.S.D., Kolkata in 1993-1994. In connection to the afore-noted irregularity, the petitioner was later on, put under suspension vide Memo No. 288 dated 02.04.1998, in contemplation of departmental proceeding and was allowed subsistence allowance.

4. A departmental proceeding was initiated against the petitioner and vide Memo No. 403 dated 24.04.1998 the charge memo was served upon the petitioner and an Inquiry Officer as well as the Presenting Officer were appointed. Further one supplementary charge memo was also issued, leveling two additional charges regarding purchase of medicines from M.S.D., Mumbai vide Memo No. 38 dated 12.01.1999.

5. The Inquiry Officer submitted his report to the



Secretary, Department of Health, Government of Bihar, vide letter dated 16.11.2023, exonerating the petitioner from all the charges, except one of the supplementary charges to be partially proved.

6. The Disciplinary Authority issued second show-cause notice concurring with the inquiry report by enclosing a copy thereof, as to why the petitioner is not dismissed.

7. The petitioner submitted a detailed reply to the second show-cause notice. However, no final order was passed and the petitioner came to be retired under suspension on 31.01.2011 after attaining the age of his superannuation.

8. Since the post retirement dues of the petitioner were not being paid despite being consistently represented before the respondent authorities, the daughter of the petitioner had sought an information under the Right to Information Act, as to under what circumstances, the retiral benefits of the petitioner are not being paid.

9. For the first time, the petitioner came to know that vide order dated 23.02.2006 (Annexure-8), he has already been terminated from his services. The petitioner immediately challenged the order of punishment dated 23.02.2006 by filing C.W.J.C. No. 8869 of 2014. After contesting, C.W.J.C. No. 8869



of 2014 was finally allowed vide order dated 17.11.2017 (Annexure-9). The learned single Judge after having found the second show-cause notice in violation of the rule 18 of the Bihar Government Servants (Classification, Control and Appeal) C.C.A. Rules, 2005 (for short “the Rules, 2005”), set aside the order of punishment dated 23.02.2006 and remanded the matter to the Disciplinary Authority to proceed afresh in accordance with law and as the petitioner had already superannuated from his service, the Disciplinary Authority was directed to pass order in accordance with law within four months.

10. Irrespective of the passing of a period of four months, when no order was passed by the respondent(s), the petitioner again approached before this Court by filing M.J.C. No. 4169 of 2018 for initiation of a contempt proceeding.

11. The Department having come to know about the filing of the contempt application, vide Resolution No. 360(9) dated 04.04.2018, again initiated a departmental inquiry after framing the same memo of charge against the petitioner under rule 17 of the Rules, 2005 by appointing a new Inquiry Officer and Presenting Officer.

12. Further, a similar supplementary charge memo has been framed against the petitioner and directed him to submit



his reply in terms of the direction contained in the Memo dated 09.04.2018. The petitioner submitted a detailed reply to the charge memo as well as the supplementary charge memo, denying the allegation on merit and objected the very initiation of the second disciplinary proceeding after his retirement on the same set of charges, that too under the Rules, 2005.

13. The Inquiry Officer on receipt of the reply of the petitioner, proceeded with the inquiry and submitted his inquiry report dated 08.08.2018, holding the main charge(s) as not proved and found one of the supplementary charges to be partially proved (Annexure-14).

14. The Disciplinary Authority after accepting the inquiry report vide Memo No. 1173(9) dated 22.10.2018, issued a second show-cause notice on proved charges. The petitioner in response thereto, submitted his explanation and also objected to the proceeding.

15. In the meantime, on being realized that the departmental proceeding was initiated against the petitioner under rule 17 of the Rules, 2005, nonetheless, the petitioner had already retired from service on 31.01.2011, issued amended resolution as contained in Memo No. 10(9) dated 03.01.2019 (Annexure-17) converting the proceeding under rule 43(a) of the



Bihar Pension Rules, 1950 (for brevity “the Rules, 1950”). Further, the respondent(s) in order to pre-empt the charge of contempt, in haste passed the order of dismissal by restoring the earlier order of punishment as contained in Resolution No. 196(9) dated 23.02.2006 under the Rules, 2005, without considering the fact that the petitioner has already superannuated.

16. As the contempt matter was pending before this Court, the learned single Judge had directed for the personal appearance of the Principal Secretary, Health Department, to explain. However, on apology, an opportunity was given to rectify the said order.

17. Accordingly, the order dated 30.01.2019 issued by the respondent no.1, maintaining the order of termination of the order dated 23.02.2006 was recalled by the Departmental Resolution No. 610(9) dated 29.04.2020 and a fresh Notification contained in Memo No. 153(9) dated 22.02.2021 came to be passed by the respondent no.3, inflicting the punishment of withholding the entire pension and gratuity, which is impugned herein.

18. Mr. Akashdeep, learned counsel for the petitioner, while assailing the impugned order, has submitted that in view



of the order dated 17.11.2017 passed in C.W.J.C. No. 8869, the Disciplinary Authority could have proceeded with the same disciplinary proceeding from the stage it was found invalid but the Disciplinary Authority abandoned the earlier proceeding and chose to initiate a fresh departmental proceeding, albeit on the same set of allegation, that too under the Rules, 2005 by issuing resolution started a fresh proceeding and appointing a new Inquiry Officer and Presenting Officer, which was not at all permissible in the facts as well as in law.

19. Apart from the above, as the petitioner had already superannuated, a fresh proceeding could have been initiated only under the Rules, 1950. However, the very initiation of the second departmental proceeding for an incident which took place more than four years prior to superannuation, was completely barred under proviso (a)(ii) of rule 43(b) of the Rules, 1950. He further submitted that the said rule does not provide for a second departmental proceeding on the same set of allegation after the first disciplinary proceeding has already been concluded by passing a final order. Moreover, the Resolution directing for initiation of a departmental proceeding as well as the memo of charge, was in violation of mandatory requirements of rule 17(3) of the Rules, 2005, as there was no



list of witnesses. In support of the aforesaid contention, the reliance has been made on a judgment rendered by a Division Bench of this Court in **State of Bihar v. Bhuwaneshwar Sharma [2013(1) PLJR 475]**.

20. He next submitted that even from perusal of the impugned order dated 20.02.2021, it would be manifest that same is cryptic and does not even suggest the application of mind, as the reply of the petitioner to the second show-cause was not taken into consideration, further the authorities failed to appreciate that even the charge memo did not record about any embezzlement of public money nor there was any charge of financial loss to the public exchequer, rather the petitioner in his reply had categorically stated that the medicines purchased were recorded in the stock register and the then Civil Surgeon, Gopalganj, during the time of epidemic had used the medicines for distribution. Further the medicines which are said to have been purchased through vouchers was/were forging his signature. He lastly submitted that the impugned order cannot be allowed to be sustained as the same has been issued in violation of the rules enumerated under the Rules, 1950.

21. *Per contra*, Mr. Ramadhar Singh, learned counsel, representing the State, submitted that the impugned order of



punishment has been passed under the provision of rule 43(b) of Rules, 1950 after the petitioner had been found in the departmental proceeding guilty of grave misconduct and financial irregularity, as charge of irregular purchase of medicines amounting to Rs. 22,49,493/- from M.S.D., Mumbai during his posting at Primary Health Centre, Katiya, Gopalganj, stands proved. The impugned order has been passed after following due process of law and also after giving adequate opportunity to the petitioner in the departmental proceeding conducted under the Rules, 1950. Moreover, the punishment has also got the approval of the State Cabinet.

22. Referring to the order of this Court dated 17.11.2017 passed in C.W.J.C. No. 8869 of 2014, he next submitted that the learned single Judge while setting aside the earlier order of termination on the point of technicality, remanded the matter to the disciplinary authority to proceed afresh in accordance with law. Thus, the respondent authority has not committed any error in initiating a fresh proceeding against the petitioner, which culminated into withholding of 100% pension and gratuity after being found the charges proved. While concluding his submission, he also drew the attention of this Court to the materials available on record,



showing that in connection to the irregularities committed in purchasing of medicines from M.S.D., Mumbai, an FIR has also been instituted by the S.D.O. Hathuwa, District Gopalganj against the petitioner along with two others, which was taken over for the investigation by the Central Bureau of Investigation on 20.06.2000 and the same was numbered as Case No. RC 8(A)-2000 under the diverse sections of the Indian Penal Code and the Prevention of Corruption Act, 1988. Moreover, after submission of the charge-sheet, the trial in the said case is pending in the Special Court, C.B.I., North Bihar, Patna.

23. This Court has given anxious consideration to the submissions advanced on behalf of the parties and meticulously perused the materials available on record.

24. Coming to the order of this Court dated 17.11.2017 passed in C.W.J.C. No. 8869 of 2014, whereby the order of termination of the petitioner in the earlier round of departmental proceeding was set aside taking note of the infirmities in the second show-cause notice, leading to apparent violation of the Rules as envisaged under rule 18 of the Rules, 2005, the matter was remanded to the Disciplinary Authority to proceed afresh in accordance with law after setting aside the order of termination. While allowing the writ petition, this Court



had observed that since the petitioner has already superannuated, the Disciplinary Authority shall pass the order in accordance with law within four months from the date of receipt/production of a copy of this order. Needless to observe that no action has been taken within the stipulated period as prescribed by the Court and without getting the order modified vide Memo No. 360(9) dated 04.04.2018 all of a sudden, the respondent/Health Department had taken a decision to initiate a fresh proceeding under rule 17 of the Rules, 2005 by issuing a fresh memo of charge and appointing a new Inquiry Officer and Presenting Officer despite knowing the fact the petitioner had already superannuated on 31.01.2011, which in the opinion of this Court, was not at all permissible to the respondent(s).

25. It has rightly been submitted on behalf of the petitioner that the Disciplinary Authority could have proceeded with the same disciplinary proceeding from the stage it was found invalid but they chose to initiate a fresh departmental proceeding on the same set of allegation under the Rules, 2005. However, having realized its mistake, the Department issued an amended Resolution contained in Memo No. 10(9) dated 03.10.2019, converting the proceeding under the rule 43(a) of the Rules, 1950 and thereby, in the opinion of this Court, again



committed a glaring mistake, as indubitably it only relates to future good conduct as an implied condition of every grant of pension. Again good sense prevailed to the respondent authorities but not in the right perspective and the respondent(s) converted the proceeding under rule 43(b) of the Rules, 1950. They further trapped in the limitation prescribed under proviso (a)(ii) of rule 43(b) of the Rules, 1950, which clearly bars any departmental proceeding in respect of an event which took place more than four years before the institution of such proceeding.

26. It is to be noted that the event of purchase of medicines, in the present case, took place in the year 1993-1999.

27. It goes without saying a departmental proceeding instituted against the government servant while on duty can be converted into a proceeding under rule 43(b) of the Rules, 1950, if during pendency of such departmental proceeding, the government servant superannuates. However, for the purposes of initiation of a fresh proceeding under rule 43(b) of the Rules, 1950, the proceeding must be in relation to an incidence which took place not beyond than four years before the institution of such proceeding.

28. Undoubtedly, had the Department proceeded with the stage where it was faulted with the shortcomings by this



Court, leading to setting aside the impugned order, then the authorities was competent enough and right therein to convert the proceeding under rule 43(b) of the Rules, 1950. But in no circumstances, the respondent authorities were empowered to initiate a fresh departmental proceeding under rule 17 of the Rules, 2005 or rule 43(b) of the Rules, 1950, much after the superannuation of the petitioner in relation to an incidence which took place, while the petitioner was posted as In-charge Medical Officer in Referral Hospital, Katiya, Gopalganj in between 02.03.1991 to 02.04.1998.

29. At this stage, it would also be apposite to quote the relevant paragraph of the Apex Court Judgment rendered in **State of Bihar & Ors. v. Mohd. Idris Ansari, [1995 Supp (3) SCC 56]**, wherein while dealing with the provision of rule 43(b) of the Rules, 1950, especially the bar provided thereunder, the Court held in its paragraphs-7 and 10 as follows:-

“7. A mere look at these provisions shows that before the power under Rule 43(b) can be exercised in connection with the alleged misconduct of a retired government servant, it must be shown that in departmental proceedings or judicial proceedings the government servant concerned is found guilty of grave misconduct. This is also subject to the rider that such



departmental proceedings shall have to be in respect of misconduct which took place not more than four years before the initiation of such proceedings. It is, therefore, apparent that no departmental proceedings could have been initiated in 1993 against the respondent under Rule 43(a) and (b), in connection with the alleged misconduct, as it alleged to have taken place in the year 1986-87. As the alleged misconduct by 1993 was at least six years' old, Rule 43(b) was out of picture. Even the respondent authorities accepted this legal position when they issued notice dated 27-9-1993. It was clearly stated therein that no action can be taken under Rule 43(b) of the Rules as the period of charges has been old by more than four years. It is equally not possible for the authorities to rely on the earlier notice dated 17-10-1987 as proceedings pursuant to it were quashed by the High Court in Writ Petition No. 6696 of 1991 and only liberty reserved to the respondent was to start fresh proceedings. The High Court did not permit the respondent to resume the earlier departmental inquiry pursuant to the notice dated 17-10-1987 from the stage it got vitiated. The respondent also, therefore, did not rely upon the said notice dated 17-10-1987 but initiated fresh departmental inquiry by the impugned notice dated 27-9-1993. Consequently it is not open to the learned



advocate for the appellant to rely upon the said earlier notice dated 17-10-1987.

“10. So far as the second type of cases are concerned the proof of grave misconduct on the part of the government servant concerned during his service tenure will have to be culled out by the revisional authority from the departmental proceedings or judicial proceedings which might have taken place during his service tenure or from departmental proceedings which may be initiated even after his retirement in such type of cases. But such departmental proceedings will have to comply with the requirements of Rule 43(b). Consequently a retired government servant can be found guilty of grave misconduct during his service career pursuant to the departmental proceedings conducted against him even after his retirement, but such proceedings could be initiated in connection with only such misconduct which might have taken place within 4 years of the initiation of such departmental proceedings against him. The High Court was equally justified in quashing the final order dated 13-12-1993 as there is no proof of such a misconduct. No question of remanding the proceedings under Rule 139(a) and (b) would survive as the alleged grave misconduct could not be established in any departmental proceedings after the expiry of four years from 1986-87, as such proceedings would



be clearly barred by Rule 43(b) proviso (a)(ii). Consequently the show-cause notice dated 27-9-1993 will have to be treated as stillborn and ineffective from its inception. Such a notice cannot be resorted to for supporting any fresh proceedings by way of remand. For all these reasons no case is made for our interference in this appeal. In the result appeal fails and is dismissed. There is no order as to costs.”

30. Further the reliance of the petitioner on a judgment of the Division Bench of this Court in **State of Bihar (supra)** also covers the dispute posed in the present matter.

31. In the case noted hereinabove, the delinquent on being aggrieved by his order of termination, approached before this Court, whereupon after setting aside the order of the termination, the matter was relegated to the Disciplinary Authority to proceed against him, whereupon the respondent(s) came out with the final order withholding the 100% pension and gratuity. The learned single Judge allowed the writ petition and set aside the order of punishment of withholding 100% pension and gratuity of delinquent (Bhuwaneshwar Sharma), on the basis that the entire proceeding initiated against him afresh in connection with the allegation relating to 1989 was not permissible in view of the bar prescribed under proviso to rule



43(b) of the Rules, 1950. The aforesaid order was put to challenge by the respondent/State. The learned Division Bench while affirming the order of the learned single Judge has held in its paragraphs-19, 20 and 21 as follows:

“19. It is true, and has been held, repeatedly by this Court, while interpreting Proviso to Rule 43(b) that a departmental proceeding instituted against the Government servant while on duty can be converted into a proceeding under Rule 43(b) if during the pendency of such departmental proceeding, the Government servant retires. Proviso (a)(ii) to Rule 43(b) of the Bihar Pension Rules empowers the Government to institute a fresh departmental proceeding in respect of an event which took place not more than four years before institution of such proceeding. No doubt in the present case a proceeding was initiated against the respondent No.1 which concluded with imposition of a punishment under Rule 43(b) of the Bihar Pension Rules with the issuance of the order dated 24.01.1998. Punishment imposed however was quashed by this Court with a liberty to the State to proceed under rule 43(b). The appellants-State would have proceeded with the same departmental proceeding initiated earlier against the respondent no.1. The State-respondent however, chose to initiate a fresh proceeding with the issuance of the resolution dated 25.05.2009 by



appointing a new Inquiry Officer and Presenting Officer. I have no hesitation in holding that the said resolution dated 25.05.2009 amounts to a fresh enquiry and from bare perusal of the resolution, it cannot be said to be in continuation of the earlier proceeding.

20. In my opinion, therefore, the bar as prescribed in Proviso (a)(ii) to Rule 43(b) of the Bihar Pension Rules comes into operation and therefore, the very foundation upon which the punishment of withholding 100% of pension is based, is vitiated. I am in complete agreement with the view expressed by the learned single Judge in the impugned order that the order passed by the Government functionaries should be tested on the basis of the recitals therein.

21. I find no ambiguity in interpreting the order dated 25.05.2009 that it intended to initiate altogether a fresh departmental inquiry under rule 43(b) which is impermissible beyond four years from the date of the alleged misconduct.”

32. Now coming to the impugned order dated 22.02.2021 (Annexure-21), this Court also finds that there is no appreciation or discussion of the reply to the second show-cause filed on behalf of the petitioner and the order impugned withholding the entire pension/gratuity has been passed only on the premise that a supplementary charge in relation to irregular



purchase of medicines to the tune of Rs. 22,49,493/- stands proved. But from perusal of the inquiry report dated 08.08.2018, the Department in order to prove the charges, has not produced any oral evidence/witness to prove the documentary evidence.

33. It was the duty of the Inquiry Officer to examine the evidence presented by the Department as to whether even the unrebutted evidence is sufficient to hold that the charges are proved. It is well settled that in absence of any examination of oral evidence, the document cannot be said to be proved and could have been taken into consideration that the charges have been proved against the respondent [**vide State of Uttar Pradesh and Ors. vs. Saroj Kumar Sinha, 2010 (2) SCC 772**].

34. It would be worth mentioning here that the purported evidence collected during inquiry/investigation against the accused/delinquent by itself could not be treated to be evidence in the disciplinary proceeding unless witness was examined to prove the said documents.

35. The Hon'ble Apex Court in the case of **Roop Singh Negi v. Punjab National Bank [(2009) 2 SCC 570]** has held that the charges levelled against the delinquent officer must be found to have been proved and the Inquiry Officer has a duty



to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. In other words, mere document(s), without examination of witness to prove the document(s) or contents thereof, could not be treated as evidence.

36. This Court also finds that the impugned order passed by the Disciplinary Authority was passed without taking into account, the grounds pleaded by the petitioner in his reply to the second show cause, thus, it certainly makes the order vulnerable. The Hon'ble Supreme Court, time and again held that such exercise tends to be violative of one of the facets of the principles of natural justice, and the opportunity given to the delinquent by way of second show-cause would be reduced to empty formality.

37. In view of the discussions made hereinabove and the position obtaining in law, the writ petition stands allowed. The Notification contained in Memo No. 153(9) dated 22.02.2021 (Annexure-21) is hereby quashed. The consequential order shall follow.



38. The respondents are directed to ensure disbursement of all the admissible dues as well as retiral benefits of the petitioner on account of setting aside the impugned order, preferably within a period of twelve weeks from the date of receipt/production of a copy of this order.

(Harish Kumar, J)

rohit/-

AFR/NAFR	AFR
CAV DATE	29.01.2024
Uploading Date	23-02-2024
Transmission Date	

