IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10793 of 2020

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Suresh Kumar Sinha Son of Late Shivanand Prasad Resident of Village/Mohalla- Sugghi, P.S.- Jamui, District- Jamui.

... ... Petitioner/s

Versus

1. The State of Bihar through the Additional Chief Secretary, Department of General Administration, Government of Bihar, Patna.
2. The Additional Chief Secretary, Department of General Administration, Government of Bihar, Patna.
3. The Principal Secretary, Department of Co-operation, Bihar, Patna.
4. The Registrar, Cooperative Societies, Bihar, Patna.
5. The District Cooperative Officer, Jamui.
6. The District Magistrate, Munger.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Sanjay Kumar, Advocate
For the Respondent/s	:	Mr. Rajeev Shekhar, Advocate

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 30-01-2024

Heard Mr. Sanjay Kumar, learned counsel appearing on behalf of the petitioner and Mr. Rajeev Shekhar, learned counsel for the State.

2. The petitioner, who was initially appointed as Deputy Collector in the State of Bihar and after serving various places, finally superannuated from the service on 31.01.2016, while being posted as Additional District Magistrate, Vaishali at Hajipur, has filed the present writ petition for the following reliefs:

"for issuance of a writ in the nature of certiorari or any

other appropriate writ/ order or direction for quashing the resolution as contained in memo no. 8227 dated 06-07-2017 issued by the order of his Excellency, the Governor, Bihar, Patna and under signed by under Secretary to the government, department of General Administration whereby and where under the 25% of the pension of the petitioner has been withheld for five years and petitioner further prays for quashing the memo of charge as contained in Prapatra-K dated 08.02.2016/07.04.2017 and also prays for issuance of consequential writ of mandamus or any other appropriate writ(s) and order(s) commanding and directing the respondent-authorities to pay the 100% pension to the petitioner with all consequential benefit if any due to be paid with statutory interest and and/or to pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances stated hereunder."

3. The short facts, which led to the filing of the present writ petition is that during the service period, while the petitioner was posted as Block Development Officer, Bariyarpur, Munger in the year 2005, the Development Fund of the Block to the tune of Rs. 10,10,416/-, which was meant for Indira Awas Yojna was deposited in one Bariyarpur Bazar,

Primary Agriculture Credit Society (PACS), (hereinafter referred to as Society) where the credit mobilization scheme was implemented. When the work of Indira Awas Yojna was started, the petitioner had issued a cheque for withdrawal of the said amount, but the Society failed to owner the cheque and defalcated the said amount. The petitioner immediately informed the District Magistrate, Munger, in consequent thereto, the District Magistrate directed the petitioner to frame a memo of charge against the Chairman and Secretary of the Society. That apart, a criminal case bearing Bariyarpur P.S. Case No. 24 of 2006 was also instituted against them along with a proceeding of certificate case.

4. It is the case of the petitioner that as on the prevailing time, several Block Development Officers as well as Government Offices were used to deposit the development fund in those societies, who were doing business of banking with facilities of withdrawal of money and thus, the deposition of the development fund to the Bariyarpur Bazar, PACS was not in derogation of any circular or order, moreover, for such action, the petitioner was also given a show-cause notice, which was duly responded by the petitioner with further intimation that the Managing Director of the Central Co-operative Bank and

District Co-operative Officer, Munger are assisting in recovery process, in accordance with law. The show-cause notice of the petitioner in the submission of the petitioner, was finally accepted without any adverse inference. It is further submitted that in due course of time, an amount of Rs. 5,71,000/- has been recovered from the Society against Rs. 10,10,416/- and for the rest amount, an Award Case under Section 48 of the Bihar Co-operative Society Act, 1935 has been instituted against the office bearers of the Society.

5. While the matter of the recovery was going on, in the meantime, the petitioner had superannuated from the service on 31.01.2016. On being superannuated, all of a sudden the District Magistrate, Munger vide its letter contained in Memo No. 243 dated 08.02.2016, framed certain charges against the petitioner in Form (Ka) alleging therein, that the petitioner was posted as Block Development Officer, Bariyarpur, Munger from 02.02.2005 to 01.03.2006. Despite, there being specific instruction of the Government to keep the government money only in nationalized bank, yet the petitioner knowingly and intentionally kept Rs. 10,10,416 of the Indira Awas Yojna in Bariyarpur Bazar, PACS Co-operative Bank in utter violation of the Government instruction. The memo of charge also contained

that after sometimes, the petitioner issued a cheque for withdrawal of the said amount, but the said cheque was dishonored by the Society. Despite several correspondences with the Chairman and Secretary of the said PACS, the amount was not paid. Thus, the government money was embezzled by the concerned authorities and, as such, the petitioner was found responsible for embezzlement of the said government money.

6. The aforesaid memo of charge framed by the District Magistrate, Munger was duly sent to the Rural Development Department, Bihar, Patna along with the documentary evidence, who in turn forwarded the matter to the General Administration Department, Bihar, Patna vide Letter No. 299062 dated 03.02.2017, with a request to take further action in the matter. It is to be noted that the parent department of the petitioner was General Administration Department and appropriate action could have been taken against the petitioner only by such department. Thus, the memo of charge was reframed against the petitioner and a show-cause notice was issued to the petitioner under Rule 139 of the Bihar Pension Rules, vide Letter No. 4207 dated 07.04.2017. The petitioner submitted his explanation vide Letter No. 04 dated 03.05.2017, and finally the impugned order came to be passed by the

Government of Bihar under the signature of Under-Secretary to the Government, Department of General Administration inflicting the punishment of withholding 25 per cent of pension for five years, under Rule 139 (C) of the Bihar Pension Rules.

7. While assailing the impugned order of punishment, it is submitted that since the petitioner has superannuated from the service on 31.01.2016, there was no relation of employer and employee existed, so the issuance of memo of charge by the respondent is wholly illegal and without jurisdiction. Further, once the District Magistrate had accepted the show-cause notice of the petitioner and no further action was taken with regard to the act of the petitioner, therefore, after retirement, the District Magistrate has had no power to frame memo of charge without serving the show-cause notice afresh.

8. Further submission has been made that once there is a specific charge of misconduct during the service period and was while within the knowledge of respondent authorities, then provisions of Rule 139 of the Bihar Pension Rules is not applicable for withholding the pension, only because of the fact that initiation of the proceeding under Rule 43 (b) was barred by limitation. Reliance has also been made on a judgment rendered in the case of ***Muneshwar Prasad Sinha Vs. State of Bihar and***

Ors. reported in ***2004 (3) PLJR 708***, ***Lall Babu Lall Vs. The State of Bihar and Ors.*** reported in ***2012 (4) PLJR 986*** and ***Chandra Nath Jha Vs. The State of Bihar*** reported in ***2019 (2) PLJR 142***.

9. Referring to the aforesaid judgment, Mr. Sanjay Kumar, learned counsel for the petitioner submitted that show-cause notice issued to the petitioner not on the grounds that service record of the petitioner was not thoroughly satisfactory, but based on the ground of alleged past misconduct. Thus, the respondents cannot be allowed to take recourse of Rule 139.

10. Per contra, learned counsel for the State while referring to the impugned order has submitted that the explanation of the petitioner was duly considered and the involvement of the petitioner in embezzlement of public money stood proved. Hence, 25 per cent of pension of the petitioner was deducted for five years under Rule 139 (C) of Bihar Pension Rules, 1950. He further submits that the petitioner himself admitted in his explanation dated 03.05.2017, that he kept the aforesaid government money in Bariyarpur Bazar, PACS, but his excuse that he was not aware of the government instruction that the government money could be kept only in nationalized bank, was not acceptable, as the petitioner was a

Government Servant, holding the post of responsibility under the State Government and ignorance of law cannot be an excuse under the law.

11. He further submits that the impugned order has been passed after exhausting due procedure prescribed under Rule 139 (C) of Bihar Pension Rules, 1950 and the deduction made from the pension of the petitioner is commensurate to the offences committed by the petitioner. The conduct of the petitioner was found to be grave misconduct on his part, while he was in service and, moreover, only after lapse of time, the charges levelled against any of the officers or employees are not vitiated suo moto and thus, in the submission of learned counsel of the State, the respondent authorities have passed the impugned order just and fit to be sustained in the eyes of law.

12. This Court has anxiously heard the learned counsel for the respective parties and also perused the materials available on record. Admittedly, the purported allegation against the petitioner was of the year 2005-2006, and the petitioner superannuated on 31.01.2016, from the post of Additional District Magistrate, Vaishali at Hajipur. The factum of deposition of development fund meant for Indira Awas Yojna, in the Bariyarpur Bazar, PACS was in the knowledge of the

District Magistrate and all the authorities concerned and on the directions of the District Magistrate, Munger a memo of charge against the Chairman and Secretary of the Society was framed, apart from lodging of criminal case and the proceeding of certificate case under Section 48 of Bihar Co-operative Society Act, 1935. The petitioner was also served with the show-cause notice, which was duly replied by him but no action was taken nor any adverse remark has been made and subsequently, the petitioner has been allowed to superannuate. For the first time, the memo of charge Prapatra 'Ka' was framed on 06.02.2016 and having come to know that the matter was found to be time barred to take suitable action against the petitioner under the provisions of Rule 43 (b) of Bihar Pension Rules, 1950, the Disciplinary Authority resolved to take action against the petitioner under Rule 139 of Bihar Pension Rules, 1950.

13. Before considering the legality of the impugned order as contained in Annexure 1 to the writ petition, it would be proper to quote Rule 139 of the Bihar Pension Rules, 1950, which reads as follows:

> *139. (a) The full pension admissible under the rules is not to be given as a matter of course, or unless the service rendered has been really approved.*
>
> *(b) If the service has not been*

thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

(c) The State Government reserve to themselves the powers of revising an order relating to pension passed by subordinate authorities under their control, if they are satisfied that the service of the pensioner was not thoroughly satisfactory or that there was proof of grave misconduct on his part while in service. No such power shall however, be exercised without giving the pensioner concerned a reasonable opportunity of showing cause against the action proposed to be taken in regard to his pension, nor any such power shall be exercised after the expiry of three years from the date of the order sanctioning the pension was first passed.]

14. Bare reading of Rule 139, it empowers the authorities sanctioning the pension or the State Government to make an overall assessment of the service of the concerned employee and to suitably reduce the amount of pension, if the service was not thoroughly satisfactory. It goes without saying that the provisions of Rule 43 (b) and Rule 139 are completely different in their nature, scope and ambit. Rule 43 (b) empowers the State Government to withhold or withdraw pension for a misconduct or to recover any pecuniary loss caused to the Government, resulting from any misconduct or negligence, if the pensioner is found guilty of grave misconduct in a

departmental or judicial proceeding, where Rule 139 of the Bihar Pension Rules, 1950 comes into the picture, where the services of an employee found to be unsatisfactory or there was proof of grave misconduct on his part while in service.

15. The similar issue has wrecked up before this Court in case of ***Muneshwar Prasad Sinha (supra)*** wherein, this Court while highlighting the nature, scope and ambit of Rule 43 (B) vis-a-vis Rule 139 of the Bihar Pension Rules, 1950 has categorically held that:

> "*There can be, therefore, no doubt that the two rules have different scope and they operate differently; one cannot be substituted for the other. In order to recover a loss caused to the Board or the State Government as a result of some specific and individual act(s) of misconduct by an employee the power under rule 139 cannot be invoked for the simple reason that there is a separate rule specially for that purpose, of course, with the bar of limitation provided therein. In this case, both the show cause notice and the impugned order make it quite clear that the Board intended to proceed against the petitioner in regard to specific events during certain periods and to recover from him the amounts of specific losses and advances. Apart from the issue whether or not the responsibility for causing*

those losses and the dues in question were established against the petitioner the relevant provision in the rules for the purpose was clearly rule 43(b) and not rule 139."

16. Now coming to the memo of charge, it goes without saying that the same relates to an incident of alleged embezzlement of public money in the year 2005-2006 and the memo of charge does not talk about unsatisfactory service of the petitioner and, as such, the memo of charge as well as the impugned order primarily aimed to recovery from the petitioner's retiral dues, certain specified losses and dues, for which it held the petitioner responsible. Thus, the memo of charge and the impugned order clearly fell under Rule 43 (B) and a mere citation of Rule 139 in the order will not make it an order under the later rule. It would be also apposite to quote the relevant paragraph of judgment rendered by the Hon'ble Apex Court in the case of State of Bihar and Ors. Vs. Mohd. Idris Ansari [AIR 1995 SC 1853]. Paragraph 10 thereof, is reproduced hereinbelow:

*"**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. In the present case, the respondent retired on 31-1-1993 and the show-cause notice was issued on the ground of grave misconduct on 27-9-1993 and not on the ground that service record of the pensioner was not thoroughly satisfactory. It was issued by the State Government as sanctioning authority. It had, therefore, to be read with Rule 43(b). Such notice therefore, could cover any misconduct if committed within 4 years prior to 27-9-1993 meaning thereby it should have been committed during the period from 26-9-1989 up to 31-1-1993 when the respondent retired. Only in case of such a misconduct, departmental proceedings could have been initiated against the respondent under Rule 43(b). In such proceedings, if he was found guilty of misconduct he could have been properly proceeded against under Rule 139(a) and (b). On the facts of the present case it must be held, agreeing with the High Court that the notice dated 27-9-1993 invoking powers under Rule 139(a) and (b) was *issued wholly on the ground of alleged past misconduct and was not based on the ground that service record of the respondent was not thoroughly satisfactory. So far as that ground was concerned, on a conjoint reading of Rule 43(b) and Rule 139(a) there is no escape from the conclusion that as the alleged misconduct was committed by the respondent prior to 4 years from the date on which the show-cause notice dated 27-9-1993 was issued, the appellant authority had no power to invoke Rule 139(a) and (b) against the respondent on the ground of proved misconduct. Consequently, it had to be held that proceedings under Rule 139 were wholly incompetent. 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."*

17. The learned counsel for the petitioner also made reliance upon a judgment of the co-ordinate Bench in the case of

Lall Babu Lall (supra) and Chandra Nath Jha (supra) wherein, the learned Court has set aside the order of withholding of pensionary benefits, taking note of the fact that the show-cause notices issued to the petitioner were not on the grounds that service record of the petitioner was not thoroughly satisfactory, but based on ground of alleged past misconduct. Thus, respondents cannot allowed to take recourse to Rule 139.

18. Having considered the settled legal position and taking note of the facts of the case as also the impugned order, which clearly based on the grounds of alleged past misconduct leading to pecuniary loss to the Government, the proceeding under Rule 139 of the Bihar Pension Rules are incompetent and wholly inapplicable.

19. It would be relevant to observe that the impugned order dated 06.07.2017 also speaks loud as it is mentioned in the order that since subject matter of the charge relate to of the year 2005-2006 and the petitioner has already been superannuated on 31.01.2016, thus, any proceeding under Rule 43 (b) of the Rules, 1950 would be barred as the event has taken place much prior to four years, however, the Disciplinary Authority has found that there is sufficient materials constituting misconduct of the petitioner. Thus, the decision has been taken to proceed

under Rule 139 of the Bihar Pension Rules, 1950.

20. In view of the aforesaid deliberations made in the impugned order, it has left with only conclusion that the department ought to proceed under Rule 43(b), but on account of the bar as provided under Rule 43(b)(a)(ii), they have proceeded under Rule 139, without there being any charge of service of the petitioner being thoroughly unsatisfactory.

21. Now coming to rule 139(c) of the Rules, 1950, it specifically states that no such power shall be exercised without giving the pensioner concerned reasonable opportunity of showing cause against the action proposed to be taken. It is not the case of the respondent that prior to impose punishment under order dated 06.07.2017, any show-cause notice for reduction of pension has been issued to the petitioner. Thus, there has been no compliance of statutory procedure under Rule 139 (c) of the Bihar Pension Rules, 1950. Well settled it is that there has been no waiver of statutory right and in fact compliance is "*sine qua non*" if the impugned order proposes to cause irreparable loss and injury.

22. In view thereof, the impugned order as contained in Memo No. 8227 dated 06.07.2017, held to be unsustainable and hereby quashed. Accordingly, the writ petition stands

allowed.

23. The respondents are directed to ensure the consequential benefits, preferably within a period of 12 weeks, from the date of receipt/production of a copy of this order.

(Harish Kumar, J)

shivank/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	31.01.2024
Transmission Date	NA