

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13030 of 2022

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Binod Kumar Mishra S/o Khedru Mishra Resident of Village- Dahila Purjuar,
P.S.- Arer, District- Madhubani.

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Health Department, Government of Bihar, Patna.
2. The Director-in-Chief (Administration), Health Services, Government of Bihar, Patna.
3. The Regional Deputy Director, Health Services, Munger Division, Munger.
4. The Civil Surgeon-cum-Chief Medical Officer, Begusarai.
5. The In-charge Medical Officer, Primary Health Centre, Nawkothe, District- Begusarai.
6. The Accountant General, Bihar, Virchandpatel Path, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Rajendra Narayan, Sr. Advocate Mr. Kripa Nand Jha, Advocate
For the Respondent/s	:	Mr. Randhir Kumar, Advocate
For the Accountant General	:	Mr. Ram Kinker Choubey, Advocate

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 05-12-2024

Re: Interlocutory Application 01 of 2024

Heard the parties.

2. Initially, the writ petition was filed seeking a direction upon the respondents to ensure the payment of all the retiral dues, including pension, gratuity, earned leave, provident fund, GIC to the petitioner, as also the due salary for the period he remained under suspension with effect from 08.03.2017 to 31.03.2022, by excluding the subsistence allowance paid to the petitioner.



3. During the pendency of the writ petition, the petitioner has been served with the Memo No. 1464 dated 04.10.2023 as well as Letter No. 1616 dated 02.11.2023, by which the claim of the petitioner has been negated and the appointment of the petitioner has been declared void *ab initio*. The orders aforementioned have been put to challenge by filing an interlocutory application bearing I.A. No. 01 of 2024.

4. Before coming to the impugned order, learned Senior Advocate for the petitioner narrated the short facts of the case. The petitioner was initially appointed as Health Educator at Primary Health Centre, Lokaha vide Memo No. 2326 dated 26.09.1989. Pursuant thereto, he submitted his joining on 01.10.1989. Upon acceptance of joining, later on the petitioner was posted at Primary Health Centre, Aunshi (Bifsi), Madhubani on 27.11.1989; and thereafter, he was posted in the office of Incharge Medical Officer, Additional Primary Healthcare Center, Pahasara Begusarai on 13.09.1990. Pursuant to the direction of the competent authority, the service book of the petitioner was opened and verified and since then, he was getting regular salary. While the petitioner was peacefully discharging his duty to the entire satisfaction of the authorities concerned, in the meantime, on 10.01.1999, an FIR



was instituted bearing Nawkothi (Begusarai) P.S. Case No. 03 of 1999, alleging therein, that the petitioner has procured the appointment on the basis of forged letter. Upon completion of a full fledged investigation, the police submitted final report as a mistake of fact, which report was duly accepted by the Chief Judicial Magistrate, Begusarai on 07.03.2009 and accordingly, the proceeding was dropped.

5. Drawing the attention of this Court to Annexure-10 to the writ petition, learned Senior Advocate for the petitioner further contended that the issue with regard to the appointment by the Civil Surgeon has also been placed in the Bihar Legislative Council and the power of the Civil Surgeon has been admitted to make such appointment. When the entire matter is set at rest, again the District Magistrate, Begusarai restarted the controversy by issuing a show-cause notice to the petitioner to clarify about his appointment. In response thereto, the petitioner submitted his reply by annexing all the documents stating that he was employed as daily wager, and his name was duly forwarded by the Employment Exchange leading to absorption/appointment by the competent authority, in the case of the petitioner, the Civil Surgeon-cum-Chief Medical Officer. The Regional Deputy Director of Health also



clarified and validated the appointment of the petitioner; nonetheless without there being any departmental proceeding, the services of the petitioner came to be terminated on 06.11.2013.

6. Aggrieved with the order of termination, the petitioner challenged the same before this Court in CWJC No. 11073 of 2015 and the learned Court after holding that if an employee is a confirmed employee, holding of a departmental enquiry would be necessary before passing an order of termination. The shortcomings in the proceeding discussed in the order and finally set-aside the termination order dated 06.11.2013 and directed the respondents to reinstate the petitioner with 50 % arrears of salary. While disposing the writ petition, this Court, however, made it clear that the same would not preclude the authorities concerned to proceed afresh against the petitioner, but in accordance with law. The copy of the order of this Court is marked as Annexure-3 to the writ petition.

7. Pursuant to the direction of this Court, the petitioner was reinstated in service and allowed all the arrears of salary, as directed by the Hon'ble Court. Soon after the reinstatement in compliance with the order of this Court, simultaneously the petitioner was put to suspension in



anticipation of departmental proceeding on the same allegation, however, without there being any charge memo or list of witnesses. Though the aforesaid order of initiation of proceeding was again questioned by the petitioner in CWJC No. 5099 of 2017, but later on it was withdrawn; and the learned Court directed the respondents to conclude the departmental proceeding within two months. On 24.01.2018, the Enquiry Officer submitted his report, but no action has been taken, notwithstanding, the petitioner was kept under suspension for a pretty long time. The petitioner further approached this Court and filed representation for revocation of suspension, but to no heed and finally the petitioner was allowed to be superannuated on 31.03.2022, after attaining the age of superannuation.

8. Taking note of the aforesaid facts of superannuation of the petitioner, the departmental proceeding converted under Rule 43(B) of the Bihar Pension Rules, 1950 vide Annexure-11 to the writ petition. On 28.11.2022, the petitioner was served with the second show-cause notice; but surprisingly, on 15.12.2022, another Enquiry Officer was appointed, who proceeded *ex parte* and submitted its enquiry report and finally the impugned order, as contained in



Annexure-14 dated 04.10.2023 came to be passed by the Director in Chief, Health Services holding the appointment of the petitioner “*void ab initio*” leading to non-payment of any retiral benefits.

9. Referring to the averments made in the writ petition and the facts, noted hereinabove, learned Senior Advocate for the petitioner contended that apart from the non-compliance of the mandatory prescriptions of Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as, “Rules, 2005”), the petitioner has not been served any charge memo or list of witnesses. There is no documents supplied to the petitioner on which the Enquiry Officer or the disciplinary authority has placed reliance. There is neither any evidence nor witnesses examined, in accordance with the Rules, 2005. The *mala fide* and the infirmities of the departmental proceeding is writ large for the simple reason that after passing of the order holding the appointment of the petitioner “*void ab initio*”, the petitioner has been served with the second show-cause notice with the enquiry report on 02.11.2023, the copy of which is marked as Annexure-15 to the writ petition.

10. Drawing the attention of this Court to the



impugned order, it is further submitted that there is neither any discussion of the enquiry report nor of the explanation filed by the petitioner. Moreover, the same has been passed admittedly without serving copy of the enquiry report or without asking the second show-cause, as the same has been served belatedly on 02.11.2023, after passing the impugned order. In support of the aforesaid contention with regard to the infirmities in the departmental proceeding, reliance has also been placed on a judgment rendered by the Hon'ble Apex Court in the case of *Avtar Singh Vs. Union of India & Ors.*, AIR 2016 SC 3598 and the decision passed in *Roop Singh Negi Vs. Punjab National Bank and Ors.*, (2009) 2 SCC 570.

11. It is lastly contended that while passing the impugned order, the concerned respondent has also referred the decision of the Hon'ble Supreme Court in the *State of Bihar and Ors. Vs. Kirti Narayan Prasad*, (2019) 13 SCC 250 and *State of Bihar and Ors. Vs. Devendra Sharma*, (2020) 15 SCC 466, which are not at all applicable in the facts of the case of the petitioner.

12. On the other hand, learned Advocate for the State countering the aforementioned submissions has vehemently contended that the very appointment of the petitioner has been



made without any advertisement and following the due process for appointment; and by a person, who was not the competent authority in this behalf and thus, the disciplinary authority has come to the conclusion that the very appointment of the petitioner is void *ab initio*. It is also the contention of the State respondents that the petitioner has all along been given proper opportunity of hearing and after considering his explanation, impugned order came to be passed.

13. Learned Advocate for the State further urged that the matter relates to forged/illegal appointment of identical persons of the Health Department traveled to the Hon'ble Supreme Court. Numerous SLPs were preferred by the aggrieved parties in the case of ***The State of Bihar & Ors. Vs. Kirti Narayan Prasad & Ors., (2019) 13 SCC 250***, wherein, the Hon'ble Supreme Court has held that since the appointment of the petitioners is *ab initio* void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise. Reliance has also been placed on an identical decision of the Hon'ble Supreme Court in the case of ***The State of Bihar & Ors. Vs. Devendra Sharma, (2020) 15 SCC 466***, wherein, the order of



termination of the forged/illegal appointment of the petitioners have been affirmed accordingly. On the strength of the aforesaid decisions, learned Advocate for the State prays for dismissal of the writ petition.

14. This Court has given anxious consideration to the submissions advanced on behalf of the learned Advocate for the respective parties and also perused the materials available on record.

15. Before parting with this case, it would be apt to encapsulate some relevant prescriptions of the Rules, 2005. Rule 17 of the Rules, 2005 deals with the procedure for imposing major penalties. Rule 17 (2) empowers the disciplinary authority that if he is of the opinion that there are grounds for inquiring about the truth of any imputation of misconduct or misbehaviour against a government servant, he may himself inquire into it, or appoint under these Rules an authority to inquire. In case, the disciplinary authority proposes to hold an enquiry, the disciplinary authority is obligated to draw up the substance of imputation of misconduct or misbehaviour as a definite and distinct article of charge and thereafter, a memo of charge containing statement of all relevant facts, a list of such document by which, and a list of



such witnesses by whom, the articles of charge are proposed to be sustained shall be served upon the delinquent under Rule 17 (4). On receipt of the article of charge, the Government servant is required to submit a written statement of his defence and his willingness to be heard in person. Rule 17 (5) (a) stipulates that on receipt of the written statement of defence, the disciplinary authority is again obligated to take a decision as to whether he himself will inquire into such of the articles of charge which are not admitted, or, if it thinks necessary to appoint, under sub-rule (2) of this Rule, an inquiry authority for the purpose he may do so.

16. The prescriptions provided under Rule 17 categorically prescribed the procedures required to be followed by the disciplinary authority and the Inquiry Officer as well as Presenting Officer. After submission of the enquiry report, Rule 18 prescribes further action. The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, may remit the case to the inquiring authority for further inquiry according to the provisions of Rule 17. However, Rule 18(2) specifically obligates the disciplinary authority that if it disagrees with the findings of the inquiring authority on any article of charge, record its



reasons for such disagreement and record its own finding on such charge, if the evidences on record is sufficient for the purpose. The disciplinary authority thereafter shall forward or cause to be forwarded a copy of the inquiry report, together with its own findings with a direction to the delinquent to submit his further explanation.

17. Now coming to the case in hand, admittedly, the very appointment of the petitioner was put to question way back in the year 1999 by institution of an FIR bearing Nawkothi (Begusarai) P.S. Case No. 03 of 1999. The criminal case came to be closed after submission of the final report and its acceptance by the jurisdictional Court on being found no material in connection with the irregularity. The controversy has further been wrecked up at the instance of the District Magistrate, Begusarai in the year 2013, which led to dismissal of the services of the petitioner on 06.11.2013 without following any procedure, which order of dismissal finally came to be set-aside by this Court in CWJC No. 11073 of 2015 vide order dated 27.12.2016 with an observation that the concerned authorities are not precluded from proceeding afresh.

18. In pursuant to the order of this Court, a fresh departmental proceeding came to be initiated, allegedly on



identical charges but without there being any charge memo or list of witnesses. The enquiry report was submitted on 24.01.2018 and no charges as alleged stand proved and henceforth, the matter remained pending, which statement of the petitioner has not even been controverted in the counter affidavit. It would be worth noticing that once an enquiry report has been submitted, the disciplinary authority under the Rule has to either accept the enquiry report or in case, he disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings.

19. This Court is also conscious of the Rule 18 (1) that if the disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, may remit the case to the inquiring authority for further inquiry. Neither there is any order of the disciplinary authority assigning reasons for remitting the case to the enquiry authority for further enquiry nor there is any tentative reason for such disagreement. This Court at this stage deems it appropriate to encapsulate the relevant paragraph of the



decisions rendered in the case of ***Punjab National Bank and Ors. Vs. Kunj Behari Misra***, reported in ***(1998) 7 SCC 84***, wherein the Hon'ble Supreme Court in paragraph no. 19 thereof, ruled as follows:

“19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

20. Surprisingly, in the case in hand, after submission of the enquiry report on 24.01.2018, no final decision came to be passed and the petitioner has been allowed to superannuate on 31.03.2022. Suffice it to observe that since no decision on the ongoing departmental proceeding could have been taken by them, the respondent authorities converted the same under Rule



43 (B) of the Bihar Pension Rules. The petitioner immediately filed his show-cause reply and demanded few documents relating to the charges leading to proceeding, apart from raising the point of non applicablility of Rule 43 (B) of the Bihar Pension Rules, 1950. However, the Director-in-Chief (Disease Control) all of a sudden, *sans* any reason, changed the Enquiry Officer and directed him to submit a report within 15 days. This letter has neither been communicated to the petitioner nor any document was supplied to him. At no point of time, any enquiry report has been submitted to the petitioner or opportunity has been accorded to him to file second show-cause. Nonetheless, the impugned order as contained in Memo No. 1464 dated 04.10.2023 came to be passed holding the appointment of the petitioner “*void ab initio*”, forfeiting all the retiral benefits. Interestingly, the unmindful action of the respondent has not ended here and for the first time, the enquiry report has been served along with a show-cause notice upon the petitioner vide letter no. 1616 (4) dated 02.11.2023 seeking show-cause reply of the petitioner on the enquiry report; much after passing of the impugned order.

21. This Court is appalled to see the manner in which an enquiry is conducted by the Conducting Officer, contrary to



all canons of settled law; and the disciplinary proceeding has been proceeded in disregard to all the relevant prescription provided under Rules, 2005. Admittedly, the very appointment of the petitioner came to be cancelled by holding his appointment void *ab initio* vide Memo No. 1464 dated 04.10.2023 and the second show-cause notice has been issued on 02.11.2023 by annexing the enquiry report. This ground alone is sufficient to set-aside the impugned order albeit there are various other reasons to hold the impugned order unsustainable; when a departmental proceeding was initiated under Rule 17 of the Rules, 2005, then it ought to be concluded in consonance with the Rule or not otherwise.

22. It would be relevant to observe that the charges levelled against the delinquent officer must be found to have been proved. Mere production of document is not necessary, the contents of documentary evidence is to be proved by examining witnesses. The Hon'ble Supreme Court in the case of ***Roop Singh Negi Vs. Punjab National Bank & Ors.***, reported in ***(2009) 2 SCC 570***, wherein, the delinquent was inflicted with the punishment based upon the content of the FIR held that mere tendering of the documents did not prove the contents thereof, unless it is proved by examining the



witnesses. It would be apt to incorporate paragraph 14 of the decision, hereinbelow:

“14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry 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. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.”

23. Now coming to the impugned order of declaring the appointment of the petitioner void *ab initio*, this Court finds that the same is only based upon enquiry report, which has never been served upon the petitioner. The impugned order also does not whisper about the explanation of the petitioner as submitted by him. Even if for the sake of satisfaction of the parties, this Court glanced at the enquiry report, it transpired that neither there is any discussion with regard to the document submitted by the Presenting Officer, on the basis of which, the Enquiry Officer has come to the conclusion of appointment



being illegal nor it talks about the explanation of the petitioner submitted before the earlier Enquiry Officer. The entire departmental enquiry is in complete disregard to the prescriptions provided under Rules, 2005.

24. Well settled it is that fraud is an issue of fact to be concluded in a duly constituted proceeding and cannot be upheld on mere allegation. This Court is also not oblivious of the fact that in earlier round of litigation in CWJC No. 11073 of 2015, though the learned Court has not expressed any opinion on the merits of the rival claims but has taken note of the undisputed facts, leading to grave error and shortcomings in the proceeding but the same has not been ratified rather again endorsed.

25. So far the reliance placed by the respondent disciplinary authority on the decision rendered in the case of ***Kirti Narayan Prasad*** (supra) and ***Devendra Sharma*** (supra) is concerned, with all humility to the decisions of the Hon'ble Supreme Court, this Court finds, it cannot be made applicable in the case in hand, unless the disciplinary authority would be able to prove that the very appointment of the petitioner was forged and illegal appointment, in accordance with law.

26. On all these grounds, the impugned order, as



contained in Memo No. 1464 dated 04.10.2023, as well as the Letter No. 1616 (4) dated 02.11.2023 by which the claims of the petitioner have been negated, are declared unsustainable and, as such, set-aside herewith. The respondents are further directed to ensure all the consequential benefits, including the pre and post retiral benefits as well as the due salary for the period, the petitioner remained under suspension, after deducting the subsistence allowance, which was already paid to him. The entire payment shall be made to the petitioner preferably within a period of twelve weeks, from the date of receipt/production of a copy of this order.

27. The writ petitions stands allowed. The interlocutory application also stands disposed off.

(Harish Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	19.12.2024
Transmission Date	NA

