

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.51 of 2022

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Dr. Shameem Shohrey Afaque, Son of Choudhary Mushtaque Hassan,
resident of Village - Choti Balia, Upper Tola, P.S.- Balia, District - Begusarai.

... .. Petitioner

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Bihar, Patna.
2. The Joint Secretary, Department of Health, Bihar, Patna.
3. The Director, Health Services Directorate, Bihar, Patna.
4. The Chief Medical Officer cum Civil Surgeon, Khagaria.
5. The Treasury Officer, Khagaria.
6. Accountant General, Bihar, Patna.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Pankaj Kumar Sinha, Advocate Mr. Rajiv Kumar Singh, Advocate Mr. Raunak Kumar Singh, Advocate
For the Resp-State	:	Mr. Ravi Kumar, AC to GP-13 Mr. Akshay Lal Prasad, AC to GP-13

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CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 12-12-2024

Heard Mr. Pankaj Kumar Sinha, learned counsel for the petitioner and Mr. Ravi Kumar, learned counsel for the State.

2. The petitioner is aggrieved with the order dated 11.08.2021 as contained in Memo No. 589(9)/Swa. Patna dated 13.08.2021, whereby he has been inflicted with the punishment of stoppage of 100% pension permanently and withholding of 10% Gratuity.

3. The short facts which led to the filing of the present



writ petition are that the petitioner was initially appointed as Medical Officer and was posted at Beldaur Primary Health Centre, Munger, where he submitted his joining on 16.07.1981. While the petitioner was posted at Palasi Additional Primary Sub-Centre Araria, all of a sudden on 01.04.2023, he had to proceed on leave on account of serious condition of his wife and thus he sent his leave application. The ailment of petitioner's wife continued for a pretty long time and when she recovered from her ailment, the petitioner submitted his joining at his Headquarter (Secretariat) on 14.12.2010; and kept on waiting for posting.

4. Learned counsel for the petitioner contended that after submission of his joining in the Headquarter (Secretariat), time without number, the petitioner had been regularly submitting his application before all the authorities concerned requesting them for his posting but his request was unheeded. Lastly, vide Notification No. 2/T-22/2011 dated 30.06.2012, the petitioner was posted at Khagaria where he joined in the office of Civil Surgeon, Khagaria on 04.07.2012. It is the contention of the petitioner that the period on which the petitioner remained on leave in between 01.04.2003 and 13.12.2010, on account of ailment of his wife, he requested for



regularization of the said period but that was not acceded to, compelling the petitioner to approach before this Court in C.W.J.C. No. 13725 of 2017. The said writ petition was disposed off with a direction to the petitioner to file a representation agitating his grievance before the respondent no. 2. In pursuant thereto, the petitioner submitted a detailed representation, explaining the reason for unauthorized absence for the period afore-noted. The request of the petitioner was turned down vide order dated 28.09.2018 issued by the Joint Secretary, Department of Health, Bihar.

5. Aggrieved with the order afore-noted, the petitioner preferred C.W.J.C. No. 5769 of 2019, and finally the learned Court vide order dated 17.04.2019 has set aside the order dated 28.09.2018 with a direction to the petitioner to make a fresh representation, annexing all his documents and evidence in support of his contention and the respondent(s) shall pass a reasoned order in accordance with law. However, in the meantime, the petitioner superannuated on 28.02.2019. Despite the aforesaid fact, a departmental proceeding was initiated under Rule 43(b) of the Bihar Pension Rules, 1950 (for short 'the Rules, 1950') vide Departmental Resolution No. 1259(9) dated 23.09.2019.



6. Learned counsel for the petitioner has thus submitted that the incident, if any, of unauthorized absence which took place in between 01.04.2003 and 13.12.2010, neither any action has been taken nor any proceeding has been initiated till the date when the petitioner remained in service. However, upon his superannuation, the department has proceeded under Rule 43(b) of the Rules, 1950, which is wholly without jurisdiction. It is further contended that the very initiation of the departmental proceeding is *void ab initio*; irrespective of the fact that the petitioner submitted his explanation to the memo of charges, but without considering his written explanation, the Enquiry Officer submitted his report, on the basis thereof, the impugned order withholding of 10% Gratuity and stoppage of 100% pension permanently came to be passed.

7. Drawing the attention of this Court to Rule 43(b)(a) (ii) of the Rules, 1950, Mr. Sinha, learned counsel for the petitioner contended that specific prescription has been made herein that no departmental proceeding can be initiated with respect to an event which took place more than four years before the institution of such proceeding. Admittedly, in the case in hand, with regard to an incident which took place in between



01.04.2003 and 13.12.2010, the departmental proceeding initiated under Rule 43(b) of the Rules, 1950, is completely barred. It is further contended that Rule 43(b) of the Rules, 1950 shall be applicable only where any pecuniary loss caused to the Government and/or if the pensioner is found in a departmental or judicial proceeding to have been guilty of grave misconduct, which is not the facts of the present case.

8. *Per contra*, learned counsel for the State while countering the afore-noted submissions of the petitioner has submitted that the impugned order of punishment has been passed after giving full opportunity to the petitioner to defend himself in the departmental proceeding under Rule 43(b) of the Rules, 1950 and in compliance with the principles of natural justice, the order of punishment has been inflicted. It is the admitted position that the petitioner had been remained continuously absent from his duty w.e.f. 01.04.2003 to 13.12.2010. As per the terms of Rule 76 of the Bihar Service Code, no Government servant can remain continuously absent from duty in excess of five years and for this, he/she is liable to dismiss from service, but since the petitioner had already superannuated on 28.02.2019, therefore, he has rightly been inflicted with the punishment of stoppage of 100% pension



permanently and 10% Gratuity under the provisions of the Rules, 1950.

9. Having heard the learned counsel for the respective parties and after meticulous examination of the materials available on record, this Court finds that admittedly the petitioner went on leave on account of the serious ailment of his wife on 01.04.2003 and remained absent to 13.12.2010. During the interregnum period, the petitioner has neither been served with any notice nor any proceeding has been initiated in terms of Rule 76 of the Bihar Service Code. The petitioner has been allowed to join in the Headquarter and later on he was posted vide notification dated 30.06.2012 and further he has been allowed to superannuate unconditionally on 28.02.2019. The proceeding, if any, for the charge of unauthorized absence, has been initiated after the retirement of the petitioner under Rule 43(b) of the Rules, 1950 by serving a copy of the memo of charge with respect to an incident which took place in between 01.04.2003 and 13.12.2010. Though, the petitioner in response to the memo of charge has submitted his explanation and participated in the proceeding under Rule 43(b) of the Rules, 1950, however, the petitioner cannot be precluded to challenge the proceeding, if the same is wholly without jurisdiction.



10. Before parting with this case, it would be worth benefiting to reproduce the prescriptions as provided under Rule 43(b)(a)(ii), which reads as follows:

“43.(b) The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of order the recovery from a pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement;-

Provided that-

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

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

11. The issue with regard to the bar as provided under Rule 43(b) of the Rules, 1950 has come up for consideration before the Apex Court in **State of Bihar and Others v. Mohd. Idris Ansari [1995 Supp(3) SCC 56]**. The relevant part of paragraphs-7 and 10 are encapsulated herein below.



“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. 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).....”

12. Further, Rule 76 of the Bihar Service Code, nonetheless, empowers the competent authority to remove a government servant, who has remained absent from his post continuously for more than five years but such order of removal/dismissal cannot be validly passed without any departmental proceeding and giving proper opportunity of hearing to the concerned government servant. Had the respondents so sanguine about the unauthorized absence of the petitioner, they should have been immediately proceeded against the petitioner in a valid departmental proceeding and pass appropriate order in accordance with law, much less before the petitioner has been allowed to superannuate on 28.02.2019.



13. Now coming to the impugned order, which speaks that had the department been knowing the fact of unauthorized absence of the petitioner, he would have been certainly dismissed from service, but since the petitioner has already superannuated and has been allowed 90% Gratuity, in such circumstances, full pension and 10% of Gratuity may be withheld; this observation of the disciplinary authority is in the opinion of this Court, is wholly unsustainable in facts and the law. The materials available on record speaks otherwise. Not only the joining of the petitioner was accepted on 14.12.2010, he was posted vide order dated 30.06.2012 and allowed to superannuate on 28.02.2019. Further, even if, for the sake of argument, it is accepted that the respondents have resorted the proceeding rule 43(b) of the Rules, 1950, there is no finding with regard to any pecuniary loss caused to the government or the petitioner is found to have been guilty of grave misconduct in a departmental or judicial proceedings.

14. Having considered the admitted facts and the settled legal position, this Court finds that the very initiation of the departmental proceeding against the petitioner under rule 43(b) of the Rules, 1950 with respect to an event which took place in between 01.04.2003 and 13.12.2010, is wholly time



barred in terms of rule 43(b)(a)(ii) and, as such, this Court has no hesitation to set aside the impugned order dated 11.08.2021 as contained in Memo No. 589(9) dated 13.08.2021 (Annexure-21 to the writ petition).

15. The respondent authorities are hereby directed to ensure full pension and 10% of Gratuity amount, preferably within a period of twelve weeks from the date of receipt/production of a copy of this order.

16. The writ petition stands allowed in the aforesaid terms.

(Harish Kumar, J)

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AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21-12-2024
Transmission Date	

