

**CIVIL WRIT JURISDICTION CASE No.3446 OF 1998**

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In the matter of an application under Article  
226 of the Constitution of India.

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Bhubaneshwar Sharma: ..... Petitioner  
Versus

The State of Bihar & others: ..... Respondents  
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For the Petitioner: Mr. Dinesh Kumar Singh,  
Senior Advocate

For the Respondent-State: Mr. Jawahar Prasad Karn,  
A.A.G. IX

For the Accountant General: Mr. P.K. Rajgrihar,  
Advocate

**P R E S E N T**

**THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR**

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**S K Katriar, J.** A superannuated employee of the Government  
of Bihar has preferred this writ petition for a  
direction to quash the order bearing Memo no.384,  
dated 24.1.1998 (Annexure-8), passed in terms of Rule  
43(b) of the Bihar Pension Rules 1950 (hereinafter  
referred to as the 'Rules), whereby his pension and  
gratuity to the extent of 100 per cent has been  
withheld for ever. The petitioner also seeks to set  
aside the order bearing Memo no.396, dated 27.1.1998  
(Annexure-9), issued by the State Government, whereby  
the pre-existing proceeding has been directed to be  
converted into one under rule 43(b) of the Rules, and

also for the consequential relief of payment of pensionary benefits admissible to the petitioner.

2. A brief narration of facts essential for the disposal of this writ petition may be indicated. The petitioner had joined the services of the Bihar Government as Assistant Engineer way back in 1965. He was posted in the Minor Irrigation Department at Bihar Sharif during the period 1980 to 23.8.1989. The State Government lodged a first information report against the petitioner alleging offences under Sections 420, 467, 468, 479, 409 and 120B of the Indian Penal Code, which was registered as Murarpur P.S. Case No.501 of 1989. The petitioner was placed under suspension on 24.12.1992. A departmental proceeding was initiated against him on the self-same charges by order dated 24.3.1993 (Annexure-3 and 3/A). The departmental proceeding remained pending, the petitioner languished in the state of suspension leading to C.W.J.C. No.4336 of 1994 at his instance. The same was disposed of by a learned Single Judge of this Court by judgment dated 27.9.1996 (Annexure-4), whereby the respondent authorities were directed to dispose of the departmental proceedings expeditiously, failing which the order of suspension was to stand automatically revoked after expiry of a period of six months. It appears that the enquiry report has already

been submitted on 1.9.1995, leading to issuance of second show-cause notice dated 16.1.1996 (Annexure-5), informing him that, in view of the findings in the enquiry report, the State Government was minded to inflict appropriate punishment on him. He was, therefore, called upon to submit his cause within a period of 15 days as to why appropriate punishment be not imposed on him. It was stated in the said communication dated 16.1.1996 (Annexure-5), that the enquiry report had been submitted on 1.9.1995.

2.1) The petitioner preferred second writ petition bearing C.W.J.C. No.5451 of 1996, for revocation of the suspension order, payment of salary, and also for quashing the entire departmental proceeding. The State Government had in the meanwhile issued its communication dated 27.5.1996 (Annexure-6), to the Bihar Public Service Commission in an effort to consult the Commission in terms of proviso (c) to rule 43(b) of the Rules. The State Government had sought the Commission's views as to the proposed punishment of dismissal from service. The writ petition was disposed of by a learned Single Judge by his order dated 14.10.1996 (Annexure-7), whereby the said communication of the State Government dated 27.5.1996 (Annexure-6) was set aside. The State Government was directed to give a fresh opportunity to the petitioner

to submit his reply to the second show-cause notice which was filed by the petitioner belatedly and not considered by the State Government. It was further directed to examine the propriety of the departmental proceeding. Before a final decision could be taken in the matter, the petitioner superannuated from the services of the Bihar Government with effect from 31.7.1997. The State Government issued the impugned order dated 24.1.1998 (Annexure-8), depriving the petitioner of the whole of his pension and gratuity for ever. This was followed by the next order dated 27.1.1998 (Annexure-9), whereby the pre-existing proceeding was directed to be converted into one under rule 43(b) of the Rules.

3. While assailing the validity of the impugned action, learned counsel for the petitioner submits that, in view of the contents of the order dated 27.1.1998 (Annexure-9), converting the pre-existing proceedings into one under rule 43(b), the impugned order dated 24.1.1998 (Annexure-8) imposing the punishment is non-est in law. Therefore, the proceedings are pending and the petitioner is entitled to 100 per cent of his pension and gratuity on provisional basis from the date of his superannuation till the date the Government takes a final decision. He has relied on the following reported judgments:

(i) 2004 (4) P.L.J.R. 5 (Baliram Pandey Vs. The State of Bihar & others).

(ii) 2007 (1) P.L.J.R. 738 (Rajendra Mishra Vs. The State of Bihar and others).

3.1) He next submits that Annexure 8 is product of non-application of mind. He next submits that Annexure-8 is bad in law also for the reason that, in view of the scope and sweep of rule 43(b), an order adverse to the superannuated employee can be passed only for mis-conduct and causing loss which predicates a detailed procedure prescribed for major penalty. He relies on the judgment of the Supreme Court, reported in **A.I.R. 1976 S.C. 667 (para 4) (State of Punjab and another Vs. Iqbal Singh)**. He next submits that the State Government has repeatedly acted in violation of the orders of this Court passed on the two writ petitions. The order of punishment was passed without the issuance of a fresh show-cause notice. He next submits that sub-rule (c) to the proviso to rule 43(b) provides that before an adverse order could be passed, consultation with the Commission is imperative. He relies on the judgment of this Court reported in **2000(1) P.L.J.R. 123 (para 8) (Sahdeo Sahu Vs. The State of Bihar and others)**.

4. The respondents have placed on record their counter affidavit and have supported the

impugned action. The learned Additional Advocate General has submitted that the findings of the enquiry report adverse to the petitioner have not been challenged before this Court. The petitioner's entire emphasis is on the alleged irregularity and illegality of the proceedings under rule 43(b) of the Rules. He next submits that a pre-existing proceeding could automatically stand converted into one under rule 43(b) and does not need specific order of this Court. He relied on the judgment reported in **2004 (4) P.L.J.R. 459 (The State of Bihar & Others Vs. Bipin Bihari Prasad and Another)**. He lastly submits that some delay has taken place in the present case but, in view of the undenied findings in the enquiry report, it would not be in the interest of justice to interfere with the impugned action.

5. We have perused the materials on record and considered the submissions of learned counsel for the parties. Two orders passed earlier on this writ petition have a bearing on the scope and the ambit of the controversy before this Court. I would first of all set out hereinbelow the order dated 5.1.2006:

5.1.2006: "Mr. Narendra Prasad for the petitioner, and learned JC to Mr. J.P. Karn, AAG IX, are present. It appears to me that the dominant relief sought for in the present writ petition is to set aside the order of punishment inflicted on the petitioner in which

case the relief of post-retirement benefits become consequential. Since the validity of departmental proceeding as a subject matter is not before me, let it go out of my board to be placed before an appropriate Bench."

Sd/-  
(S.K. Katriar)

Consequently it was laid before another Bench which passed the following order on 12.2.2008:

12.2.2008: "The prayer of the petitioner in this writ application was two-fold, one for a direction to make payment of pensionary benefits and another for quashing the order, contained in Memo No.384, passed in the proceeding initiated under Rule 43(b) of the Bihar Pension Rules. Counsel for the petitioner submits that he is ready to abandon the first relief by which prayer was made for quashing the order dated 29.01.1998.

Let the first relief be deleted and list this matter before the appropriate Bench under the retirement benefit"

Sd/-  
(Mridula Mishra)

6. The impugned order of punishment is contained in Memo no.384, dated 24.1.1998 (Annexure-8).

It is thus evident that the petitioner during the course of proceedings before this Court on 12.2.2008 abandoned his grievance with respect to the validity of Annexure-8. I must sound a note of caution that Annexure-8 is really dated 24.1.1998, and, by a slip of the pen, has been described as the order of 29.1.1998. However, it is evident on a plain reading of the said order dated 12.2.2008 that it is adverted

to the order bearing Memo No.384, dated 24.1.1998 (Annexure-8). In that view of the matter, it is no longer open to the petitioner to challenge the validity of Annexure-8, and has attained finality. I am, therefore, not inclined to examine its validity.

7. In view of the foregoing discussion, the validity of the order dated 27.1.1998 (Annexure-9) has to be examined. Before I proceed further, I must note the submissions advanced by learned counsel for the petitioner that Annexure-9 was issued under the orders of the Governor of Bihar and, therefore, shall take precedence over Annexure-8. In view of the totality of the circumstances, it appears to me that Annexure-9 was issued inadvertently and, in the totality of the circumstances, has to be ignored. This has to be read with the well established legal position, that if the departmental proceeding had already commenced while the employee was still in harness, the same gets converted by automatic operation of law after his superannuation into one under rule 43(b), and does not need a formal order of conversion. While sitting in Division Bench, I had the occasion to examine this question in the case of **The State of Bihar & Ors. Vs. Bipin Bihari Prasad & Anr. (supra)**. Relying on the various judgments including those of the Supreme Court, the law to the



aforesaid effect was affirmed. Paragraphs 5 to 8 of the judgments are reproduced hereinbelow for the facility of quick reference:

"5. Having considered the rival submissions, we are of the view that the contention advanced on behalf of the appellants must prevail. Learned Govt. Pleader has rightly relied on the aforesaid Full Bench judgment which lays down to the effect that in a case where a disciplinary proceeding had already been started while the employee was in service, even if the person concerned attains the age of superannuation, the enquiry may be continued under Rule 43 of the Pension Rules, for the limited purpose of taking such action as provided under the said Rules even after such superannuation and for that purpose no specific or express order of the Government is necessary. It appears that the judgment of the Full Bench was not brought to the notice of the Hon'ble Single Judge. In the conspectus of the entire proceeding, we are of the view that the aforesaid show-cause notice dated 12.5.89 (Annexure-1) was initiated in terms of rule 55A which was a proceeding for minor penalty, which has had to be disposed of on the basis of representation. No specific charges are required to be framed and proved in a departmental proceeding with respect to minor penalty. In that view of the matter, the ratio of the aforesaid full Bench judgment applies on all fours to the present case. The departmental proceeding having been initiated while respondent no.1 was still in service, the same gets converted into one under rule 43 of the pension Rules by automatic operation of law, and a formal order of conversion does not in any way adversely affect the validity of the latter. However, as a measure of abundant precaution, the State Government had issued the order dated 6.1.99 (Annexure-6), converting the departmental proceeding into one under rule 43 of the Pension Rules. We have no manner of doubt that in

view of the legal position that such a formal order was not required to be issued but in fact was issued, does not render conversion of the proceeding bad in law. In that view of the matter, we disagree with the conclusion arrived at by the learned Single Judge that the proceeding under rule 43(b) of the Pension Rules was bad in law, and conclude that the same was valid."

"6. We would also like to notice the judgment of the Supreme Court relied on by the learned counsel for respondent no.1, reported in **1995(2) PLJR 51: AIR 1995 SC 1853 (State of Bihar vs. Mohd. Idris Ansari)** (Supreme Court Section). It is manifest from a plain reading of the judgment that their Lordships were considering the validity of proceedings under the Pension Rules initiated after superannuation of the concerned employee. The judgment is an authority on the scope and ambit of Rule 43(b) and Rule 139 of the Pension Rules, and with respect to proceedings started thereunder after superannuation of the employee. On the contrary, we have already held hereinabove that the disciplinary proceeding against respondent no.1 in the present case had been initiated while he was in service. In that view of the matter, the aforesaid judgment of the Supreme Court in the case of **Mohd. Idris Ansari** (supra) does not apply to the facts and circumstances of the present case, and the issue is entirely covered by the aforesaid Full Bench judgment of this Court in the case of **Shambhu Sharan vs. State of Bihar.**"

"7. Learned counsel for respondent no.1 has also relied on proviso (c) to rule 43(b) of the Pension Rules which is to the effect that the Bihar Public Service Commission shall be consulted before the final order is passed. We are unable to accede to this contention for two reasons. Firstly, this proviso applies in a situation where departmental proceeding has been instituted after the concerned employee has superannuated from the Government service. On the contrary,

the position is altogether different in the present case, and we have already held hereinabove that the departmental proceedings against respondent no.1 had been initiated against him while he was in service. Therefore, proviso (c) to rule 43(b) of the Pension Rules is not attracted in the present case. Secondly, Article 320(3) of the Constitution of India lays down that the Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted on all the matters mentioned therein. This provision fell for consideration of the Supreme Court in the judgment reported in **AIR 1957 SC 912 (State of U.P. vs. Manbodhan Lal Srivastava)**, and **AIR 1970 SC 158 (Ram Gopal Chaturvedi vs. State of M.P.)** wherein it has been held that the provisions of Article 320(3) of the Constitution of India is directory in nature. The said judgment in the **State of U.P. vs. Manbodhan Lal Srivastava** has been handed down by the Constitution Bench. Article 320(3) of the Constitution has lost much of its importance since the aforesaid decisions of the Supreme Court that while Article 311 confers a right upon the government servant, Article 320(3) (c) does not confer any such right. The consultation prescribed by the sub-clause is only to afford proper assistance to the Government in assessing the guilt or otherwise of the delinquent officer as well as the suitability of the penalty to be imposed. Article 311 is not controlled by Article 320(3). The omission of, or irregularity in such consultation, does not give rise to any cause of action, the aggrieved officer has no remedy in a Court of law, nor any relief under the extraordinary powers conferred by Article 32 and 226 of the Constitution can be granted. The Commission's function is purely advisory. The provision in question is quite similar to the provisions of Article 320(3) of the Constitution. In that view of the matter, we hold that failure on the part of the State Government to consult the Bihar Public Service Commission before

passing the final order does not render the order in question illegal, apart from our earlier conclusion that the provision in question is not attracted to the facts and circumstances of the present case."

"8. In view of our conclusion hereinabove to the effect that conversion of the proceeding under rule 43(b) of the Pension Rules was valid in law, we make it clear that it will be open to respondent no.1 (the writ petitioner) to prefer statutory appeal under Part XIII of the CCA Rules. The judgment of a learned Single Judge of this Court, reported in **1997(1) PLJR 841 (Rajendra Prasad Singh vs. The State of Bihar & Ors.)** has been brought to our notice according to which, the appeal in such a case lies before the Governor of Bihar which has to be disposed of on merits, and the question of limitation, if any, shall not come in his way."

8. The impugned order (Annexure-9) has no legal effect, fit to be ignored, and is non-est in law.

9. Before I conclude, I must state for the sake of my judicial conscience that there were ample materials on record to impose the punishment as per Annexure-8. The following portion of Annexure-8 is relevant in the present context which summarises the findings against the petitioner as per the enquiry report dated 1.9.1995, and present him in a position worse than dim light:

श्री शर्मा के मामले की सम्यक समीक्षोपरान्त सरकार द्वारा श्री शर्मा पर निम्न आरोप प्रमाणित पाया गया: -

क- एन0आर0आई0पी0 के नियमों का बिना पालन किये हुए तथा सक्षम पदाधिकारी के बिना स्वीकृति प्राप्ति

के 10.60 लाख रुपये की सामग्री का अनियमित कय किया गया तथा अनियमित भुगतान किया गया जिसका न तो एम0बी0 ही उपलब्ध है और न प्रमाणक ही/

ख- मेसर्स चन्दन मेटल इन्डस्ट्रीज बिहारशरीफ से सामानों की आपूर्ति लिया गया जबकि इस तरह का कोई फर्म ही अस्तित्व में नहीं है /

ग- नाम पटल की खरीदगी बाजार दर से (अधीक्षण अभियंता से स्वीकृत दर) अधिक दर से किया गया मेसर्स चन्दन मेटल इन्डस्ट्रीज, शाखा बिहारशरीफ से/

घ- मेसर्स चन्दन मेटल इन्डस्ट्रीज के मालिक श्री अशोक सिंह हैं जो उनके सौतेले साला के लडके हैं!  
अतः इनके निकट संबंधी होने का प्रमाण पाया गया /

The findings speak of gross irregularities favouritism, and fraud attributable to the petitioner.

It is evident that the petitioner has caused pecuniary loss to the Government and was guilty of grave misconduct.

10. It is further relevant to state that the enquiry report submitted on 1.9.1995, while the petitioner was still in harness. Furthermore, the petitioner had already submitted his explanation to the second show-cause notice which is already on record and was considered by the authorities before Annexure-8 was passed. I must also state that in the wake of 42<sup>nd</sup> amendment to the Constitution of India, issuance of a second show-cause to the delinquent

employee to determine the quantum of punishment has been dispensed with. There are adequate materials on record which convince me that adequate opportunity was afforded to the petitioner at all stages to rebut the charges, and also on the question of proposed punishment. The enquiry report was submitted while the petitioner was still in service and, therefore, consultation of the Public Service Commission was needed. In any view of the matter, consultation with the Commission is directory and failure to do so, or any error or irregularity in doing so, does not go to the root of the matter and can not be destructive of the order of punishment. See the extracted portion of **State of Bihar Vs. Bipin Bihari Prasad & Anr.**(supra).

The respondent authorities were, therefore, justified in passing the order contained in Annexure-8.

11. In the result, I do not find any merit in this writ petition. It is accordingly dismissed. In the circumstances of the case, however, there shall be no order as to costs.

**(Sudhir Kumar Katriar, J.)**

Patna High Court, Patna  
Dated the 23<sup>rd</sup> day of May, 2008  
S.K.Pathak/ (A.F.R.)

