

WP(C) 5108/2006

BEFORE

HON'BLE MR. JUSTICE A.K. GOSWAMI

Heard Mr. S. Chauhan, learned counsel for the Petitioner. Also heard Mr. SK. N. Mohammad, learned State Counsel appearing for the Respondents.

Husband of the petitioner, namely, Dimbeswar Saharia retired from service in February 2002 while working as Lat Mandal. He died on 30.05.2005.

Pending drawal of departmental proceedings, husband of the petitioner was suspended with immediate effect by an order dated 01.08.1997 passed by the Deputy Commissioner, Darrang. Charge-sheet was submitted against the husband of the petitioner on 29.08.1997 and an enquiry was conducted with regard to the charges framed.

Enquiry was conducted and thereafter, on conclusion of the enquiry, the Deputy Commissioner, Darrang passed an order dated 19.01.1998 dismissing the husband of the petitioner from service.

Basic allegations levelled against the husband of the petitioner was misusing and over-stepping his authority in handing over advance possession of 11 bighas of V.G.R land in favour of a school without any orders from the competent authority and making a false entry in the chitha.

Against the said order dated 19.01.1998, an Appeal was preferred before the respondent no. 2, who, by his order dated 30.06.1999 holding that penalty of dismissal was very harsh, altered the penalty imposed by withholding 3 annual increments with cumulative effect.

On 29.01.2005/18.03.2005, the respondent no. 2 passed an order on the subject of clarification as regards the payment of subsistence allowances and other allowances to the husband of the petitioner. The relevant extract is as follows:

With reference to your letter on the subject quoted above, I would like to inform you that Sri Dimbeswar Saharia, Retd. Lot Mandal of Patharighat Revenue Circle of your district is not entitled to the full pay and allowances during his suspension period but to such portion thereof as may be fixed by disciplinary authority or appellate authority, as the case may be, in terms of FR 54(1)(4), since he was reinstated with imposition of penalty consequent upon disciplinary proceedings drawn up against him.

However, the fractional pay and allowances payable to him during the period under suspension must not be less than the subsistence allowances already drawn by him as per FR 53. In other words, no additional amount as pay and allowances is required to be paid to him as of now apart from the subsistence allowances already paid to him.

Further, in terms of FR 54 (1)(4) during the period of his dismissal with effect from 19.01.1998 to 29.08.1999 he will be entitled to proportionate pay and allowances not less than the subsistence allowances as admissible to him under FR 53, as his dismissal was set aside by appellate or reviewing authority.

Based on the aforesaid Order, the Deputy Commissioner, Darrang, Mangaldoi passed an Order on 21.03.2006, holding that the husband of the petitioner would be allowed to draw proportionate allowances not less than the subsistence allowance already drawn. No additional amount as pay and allowances will be paid to him apart from the subsistence allowance already paid to him. It was also provided that the period of suspension/dismissal shall be treated as on duty for the purpose of pension only.

The petitioner has filed this writ application seeking a direction for payment of remaining pay and allowances for the period from 01.08.1997 to 30.08.1999 i.e.

the period between suspension/ dismissal to date of re-instatement. Prayer is also made for setting aside the orders dated 29.01.2005/18.03.2005 and 21.03.2006.

Mr. S. Chauhan, learned counsel for the petitioner, submits that the husband of the petitioner was entitled to full pay and allowances from 01.08.1997 to 30.08.1999 by virtue of order dated 30.06.1999 under F.R. 54. It is submitted that the orders impugned were passed without issuing any show-cause notice and/or without

t hearing the petitioner's husband and as such same are violative of the principles of natural justice.

No affidavit-in-opposition has been filed by the State respondents.

However, Mr. Sk. N. Mohammad, learned State Counsel submits that though the appellate authority did not pass any order with regard to treatment of the suspension/dismissal period while imposing penalty of withholding of 3 increments with cumulative effect vide order dated 30.06.1999, subsequently, the same was cured by passing appropriate orders dated 29.01.2005/18.03.2005 and 21.03.2006. He has submitted that the period of suspension/dismissal has been treated to be as on duty for the purpose of pension. The learned counsel submits that the husband of the petitioner had at no point of time challenged non-regularization of the said period during his life time and that the appellate authority, while passing the order dated 30.06.1999, had not interfered with the findings recorded in respect of the charges.

F.R. 54 reads as follows:

F.R. 54 (1). When a Government servant who has been dismissed, removed or compulsorily retired is re-instated as a result of appeal or review or would have been so re-instated but for his retirement on superannuation while under suspension preceding the dismissal, removal or compulsory retirement, the authority competent to order re-instatement shall consider and make a specific order -

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be;

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Whether the authority competent to order re-instatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement as the case may be;

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation and after considering the representation, if any, submitted by him direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such proportion of such pay and allowances as it may determine.

(3) In the case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as the period spent on duty for all purposes.

(4) In cases other than those covered by sub-Rule (2), including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirement of clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held the Government servant shall, subject to the provisions of sub-rules (6) and (7) be paid such proportion of the full pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any submitted by him in that connection within such period which in no case shall exceed sixty days from the date on which

ch the notice has been served as may be specified in the notice. Provided that any payment under this sub-rule to a Government servant other than a Government servant who is governed by the provisions of the Payment of Wages Act, 1936 (4 of 1936) shall be restricted to a period of three years immediately preceding the date on which orders for re-instatement of such Government servant are passed by the appellate authority or reviewing authority, or immediately preceding the date of retirement on superannuation of such Government servant as the case may be.

(5) In the case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as period spent on duty, unless the competent authority specifically direct that it shall be so treated for any specified purpose;

Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

(6) The payment of allowances under sub-rule (2) of sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The proportion of the full pay and allowances determined under the provision to sub-rule (2) or under sub-rule (2) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(8) Any payment made under this rule to Government servant on his re-instatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of re-instatement. Where the employments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the Government servant.

From a perusal of the aforesaid provisions, it would appear that the authority competent to order re-instatement must pass a specific order regarding the pay and allowances to be paid to the government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be and also indicating whether or not the said period can be treated as on duty.

F.R. 54(4) provides that in cases other than those covered by sub-rule 2, such order is to be passed after giving notice to the Government servant.

It would be apparent from the discussions above that the husband of the petitioner was not fully exonerated and therefore provisions contained in F.R. 54(2) will not be applicable to the petitioner's husband.

It is true that the appellate authority was remiss in not passing an appropriate order at the time of re-instatement, regulating the suspension/ dismissal period. Belatedly though, the same has been sought to be regularised in the manner noticed above. Mr. Chauhan, however, is correct in submitting that F.R. 54(4) requires giving of notice to the Government servant before an order is passed regulating the period of suspension/dismissal etc. in the event of re-instatement.

Though Mr. Chauhan submits that the impugned orders are liable to be quashed only on the ground of infraction of F.R. 54(4) for not giving opportunity of hearing to the husband of the petitioner, I am unable to accept the submission.

More often than not, in case any order is set aside on the ground of violation of principles of natural justice, liberty is granted to the authorities to re-consider the matter by following the principles of natural justice, if so advised. As the petitioner is no more, the matter cannot also be sent back for fresh consideration by the authority after affording opportunity of hearing to the petitioner.

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Principles of natural justice cannot be put in a straight-jacket formula and water-tight compartment. This Court cannot be oblivious of the fact that the husband of the petitioner had, at no point of time, as it appears from the material on record, made any demand for pay and allowances for the aforesaid period. It is also noticed that the husband of the petitioner was not exonerated and only the quantum of punishment was altered.

Considering the matter in its entirety and particularly taking note of the fact that payment for the period of suspension/dismissal was not demanded by the husband of the petitioner, even after his retirement in 2002, I am not inclined to exercise the extra-ordinary, equitable and discretionary jurisdiction of this Court under Article 226 of the Constitution of India to grant the relief as prayed for at this point of time.

Accordingly, the petition is dismissed.

No cost.