

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.20391 of 2018

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Vivekanand Singh Son of late Balmiki Singh Resident of Village P.O.-
Pyarepur, P.S., Sarmera, District- Nalanda.

... .. Petitioner/s

Versus

1. The State Of Bihar.
2. The Director General of Police, Bihar, Old Secretariat, Patna.
3. The D.I.G. of Police, Military Police, Central Zone, Patna.
4. Commandant, B.M.P. -4, Dumraon, Buxar.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ram Hriday Prasad
For the Respondent/s : Mr. Manish Kumar, GP-4

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CORAM: HONOURABLE MR. JUSTICE KUMAR MANISH
CAV JUDGMENT

Date : 18-08-26

1. Heard learned counsel for the petitioner and learned counsel appearing on behalf of the State-respondents.

2. The present writ application has been filed by the petitioner seeking quashing of the order dated 09.06.2018 (Annexure-2) passed by the Commandant, B.M.P.-4, Dumraon, Buxar, whereby salary for the period from 02.07.2013 to 18.01.2018 has been denied by treating the said period as Extraordinary Leave on the principle of "No Work No Pay", and for a direction upon the respondents to release salary and all consequential monetary benefits for the said period.

3. Brief facts emerging from the pleadings are that the petitioner was appointed as a Constable in B.M.P.-10, Patna on 24.02.1986, was subsequently promoted to the post of Hawaldar and posted in B.M.P.- 4, Dumraon, Buxar. He was dismissed from service on 02.07.2013.



The petitioner preferred appeal before the DIG of Police, Military Police, Central Zone, Patna and memorial having failed, the petitioner approached this Court by filing *C.W.J.C. No.10629 of 2014*. This Court, by judgment dated 28.11.2017 (Annexure-1 to this Writ petition), set aside the dismissal order along with the appellate and memorial orders and remitted the matter to the competent authority to proceed afresh after furnishing the enquiry report to the petitioner.

In light of the order passed by the Hon'ble High Court, Patna in *C.W.J.C. No. 10699*, the Director General of Police, Bihar, Patna, vide Office Memo No. 253 / 345729 / L.O.-01 dated 27.12.2017, cancelled/set aside the order of the Disciplinary Authority and the order passed by the Appellate Authority, as well as the order passed at the Police Headquarters level on the memorial representation, after due review, and issued orders to reinstate the petitioner into service. Furthermore, while providing a copy of the Inquiry Officer's opinion, instructions were issued to obtain the petitioner's statement (defense explanation) and pass an appropriate order based on the available evidence.

4. In light of the orders of the Hon'ble High Court, Patna, Director General of Police, Bihar, Patna, a defense explanation was obtained from the delinquent employee (petitioner), and the witnesses in Departmental Inquiry (D.I.) No. 07/13 were examined. During the examination, the witnesses of D.I. No. 07/13 did not confirm the incident of verbal abuse and threats to shoot made by the petitioner. However, a medical examination of the petitioner was conducted regarding him being in an intoxicated state on the firing butt. The Medical Officer, Bihar



Military Police-02, Dehri, noted in his prescription that the petitioner was partially intoxicated. Consuming alcohol while on duty reflects indiscipline on the part of the petitioner.

Therefore, finding the petitioner guilty of consuming alcohol during duty, one year's increment was withheld, which was equivalent to two black marks (cumulative penalties), without having any effect on future salary increments. As a result of the cancellation of the order of dismissal and the setting aside of the punishment of dismissal following the order of the Hon'ble High Court, Patna in *C.W.J.C. No. 10629/14*, appeal, and memorial representation, the services of the petitioner were regularized, and the period of dismissal from 02.07.2013 to 18.01.2018 was adjusted as Extraordinary Leave on the principle of "No Work, No Pay".

5. Learned counsel appearing on behalf of the petitioner submitted that once the dismissal order had been set aside by this Court, the petitioner became entitled to all consequential benefits including salary for the period during which he remained out of service. It was argued that the petitioner was prevented and compelled from performing his duties solely because of the illegal dismissal order passed by the respondents, and therefore, the doctrine of "No Work No Pay" has no application. Reliance was also placed upon earlier judicial decisions of this Court passed in *CWJC No. 1821 of 2000 (Pramod Kumar Paswan vs. The State of Bihar & Ors.)* and *CWJC No. 9499 of 2011 (Jagjiwan Ram vs. The State of Bihar & Ors.)* wherein salary for the dismissal period had been granted after reinstatement.



6. Per contra, learned Counsel for the State has supported the impugned order and have submitted that the petitioner was not honourably exonerated of the allegations. It is contended on behalf of the State that the petitioner had been found guilty of serious misconduct, namely, remaining under the influence of alcohol while on duty, abusing superior officers, threatening persons while carrying a machine gun and that he had a history of several earlier departmental punishments. It is further submitted on behalf of the Respondent that the earlier judgment of this Court had merely set aside the dismissal order on procedural grounds and did not direct for payment of back wages. Therefore, the competent authority rightly treated the intervening period as Extraordinary Leave and denied salary by applying the settled principle of "No Work No Pay".

7. Having heard learned counsel for the parties and having perused the materials on record, the principal issue which falls for consideration is whether the petitioner, whose dismissal order was set aside and who was subsequently reinstated in service, is entitled as a matter of right to salary/back wages for the period from 02.07.2013 to 18.01.2018, or whether the respondents were justified in treating the said period as Extraordinary Leave by applying the principle of "No Work No Pay".

8. The law relating to grant of back wages after reinstatement is well settled. In **J.K. Synthetics Ltd. v. K.P. Agrawal, (2007) 2 SCC 433**, the Hon'ble Supreme Court categorically held that reinstatement and payment of back wages are two distinct reliefs, and one does not automatically follow the other. The Court observed that back wages are not a natural consequence of reinstatement and depend



upon the facts and circumstances of each case (Paras 17, 18 & 21). Likewise, in **U.P. State Brassware Corporation Ltd. v. Uday Narain Pandey, (2006) 1 SCC 479**, the Apex Court held that payment of full back wages is not an inevitable consequence of setting aside an order of termination and that the relief has to be moulded keeping in view the principles of justice, equity and good conscience (Paras 41-45).

The Hon'ble Supreme Court in **Deepali Gundu Surwase vs. Kranti Junior Adhyapak Mahavidyalaya, (2013) 10 SCC 324**, had come out with the following propositions:

- i In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.*
- ii The aforesaid rule is subject to the rider that while deciding the issue of back wages, the Adjudicating Authority or the Court may take into consideration the length of service of the Employee/ Workman, the nature of misconduct, if any, found proved against the Employee / Workman, the financial conditions of the employers and similar other factors.*
- iii Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the Adjudicating Authority or the Court of first instance that he / she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages then it*



has to plead and also lead cogent evidence to prove that the employee / workman was gainfully employed and was getting wages equal to the wages he / she was drawing prior to the termination of service. This is so because it settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the Employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

- iv *The cases in which the Labour Court/Industrial Tribunal exercises power under [Section 11-A](#) of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and / or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.*



- v *The cases in which the competent Court or Tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimizing the employee or workman, then the concerned Court or Tribunal will be fully justified in directing payment of full back wages. In such cases, the superior Courts should not exercise power under [Article 226](#) or 136 of the Constitution and interfere with the award passed by the Labour Court, etc., merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The Courts must always be kept in view that in the cases of wrongful / illegal termination of service, the wrongdoer is the employer and sufferer is the employee/workman and there is no justification to give premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.*
- vi *It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The Courts should bear in mind that in most of these cases, the employer is in an advantageous position*



vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer, i.e., the employee or workman, who can ill afford the luxury of spending money on a lawyer with certain amount of fame.

9. Applying the aforesaid case at hand, it is incumbent upon the Disciplinary Authority to ascertain the facts and circumstances relating to the actual position of the delinquent / employee with regards to factors like other gainful employment, or getting the same or substantially similar emoluments elsewhere. This can only be done when an opportunity of hearing is provided to the employee.

10. At this juncture, it would be relevant to point out the **Rule 12 of the Bihar Government Servants (CCA) Rules, 2005**, which stipulates the following:

(1) When a Government Servant, who has been dismissed, removed or compulsorily retired, is reinstated as a result of appeal or would have been so reinstated but for his retirement on superannuation while under suspension or not, the disciplinary authority shall consider and pass 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; and

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



(2)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, in cases-

(i)where the disciplinary authority is of opinion that the Government Servant who had been dismissed, removed or compulsorily retired has been fully exonerated, or

(ii)where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate authority solely on the ground of noncompliance of the requirement of these Rules and no further inquiry is proposed to be held :

Provided that where such authority is of the 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 be determined by him.



(3) *In a 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 a period spent on duty for all purposes.*

(4) *In cases other than those covered by sub-rule (2) of this Rule the Government Servant shall, subject to the provisions of sub-rule (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 disciplinary authority may determine. The disciplinary authority shall determine the proportion of such payment 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 sixty days from the date on which the notice aforesaid is served on the Government Servant.*

(5) *In a 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 a period spent on duty, unless the disciplinary authority specifically directs that it shall be so treated for any specified purpose:*



Provided that if the Government Servant so represents, such authority may after consideration, 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) or sub-rule (4) shall be subject to all other conditions under which allowances are admissible.

(7) The proportion of the full pay and allowances determined under the proviso to sub-rule (2) or under sub-rule (4) shall neither be equal to the full pay and allowances nor less than the subsistence allowance and other allowances admissible under Rule 10, as the case may be.

(8) Any payment made under this Rule to a Government Servant on his reinstatement 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 reinstatement. Where the pay and allowances admissible under this Rule are equal to or less than the amounts earned during such employment elsewhere, nothing shall be paid to the Government Servant.



11. On the scrupulous reading of the foregoing provision enshrined in **Rule Sub Rule 1 of Rule 12 of Bihar Government Servants (CCA) Rules, 2005**, it is crystal clear that the authority competent to order reinstatement, is mandated and conferred with the power to make specific order regarding the payment of back wages, arrear of salary, allowances, etc. Furthermore, the said rule outlines the procedure and manner in which an order under this Rule has to be passed.

12. Sub Rule 4 and Sub Rule 5 of Rule 12 categorically states that the Disciplinary Authority shall determine the proportion of such payment of pay and allowances for the period of dismissal, removal or compulsory retirement, after giving notice to the Government Servant, and thereafter Authority shall proceed to pass a reasoned order for the payment of back wages, pay, or allowances as the case maybe.

13. It is also imperative to produce **Rule 97 of the Bihar Service Code**, which states as follows:

“(1) When a Government Servant who has been dismissed, removed or suspended, reinstated the authority competent to order reinstatement shall consider and make specific order –

a. Regarding the pay and allowances to be paid to the Government Servant for the period of his absence from duty, and

b. Whether or not the said period shall be treated as a period spent on duty.”



(2) Where the authority mentioned in sub-rule (1), is of opinion that the Government servant has been fully exonerated, or in the case of suspension, that it was wholly unjustified, the Government servant shall be given full pay and allowance to which he would have been entitled has he not been dismissed, removed or suspended, as the case may be

(3) In other cases, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe: Provided that the payment of allowances under clause (2) or clause (3) shall be subject to all other conditions under which such allowance are admissible.

(4) In a case falling under clause (2) the period of absence from duty shall be treated as a period spent on duty for all purposes.

(5) In a case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty, unless such competent authority specifically directs 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 shall be converted into leave of any kind due and admissible to the Government servant.

14. From Sub-Rule 2 of Rule 97 of Bihar Service Code, it would appear that in case the government servant has been fully exonerated and if it is found that the suspension is wholly unjustified, the government servant shall be given full pay



and allowances for which he would have been posted as he has not been put under suspension. Sub-Rule 3 of Rule 97 of the Bihar Service Code says that in other cases the government servant shall be given only such proportion of pay and allowances as the competent authority may prescribe and for that a notice has to be given to the delinquent.

15. It is not out of place to mention that in the case of **Yogendra Prasad vs. State of Bihar having CWJC No. 19086 of 2008**, it was categorically held, that in view of the provisions as contained in Sub-Rule 3 of Rule 97 of the Bihar Service Code, notice has to be given to the delinquent and thereafter, the authority should pass order for withholding any part of salary and allowance during the suspension period. The Division Bench of this court has also held, as reported in **1988 P.L.J.R. at Page 82 (Shri Mahabir Prasad Vs. The State of Bihar and Others)** that in such circumstances, the salary and other allowances during the suspension period could not be held without giving notice to the delinquent.

16. Applying the aforesaid settled principles to the facts of the present case, this Court finds that although the dismissal order was set aside vide order dated *C.W.J.C. No.10629 of 2014*, the petitioner was neither honourably exonerated nor did the earlier judgment direct for payment of back wages. Rather, the matter was remitted to the competent authority after noticing procedural irregularities in the departmental proceeding. The counter affidavit further discloses that the petitioner had been proceeded against for serious misconduct and had also suffered several departmental punishments during his service career.



17. Pursuant to the earlier judgment dated 28-11-2017, the respondents reinstated the petitioner, restored his increment and regularized his services. However, while passing the impugned order dated 09.06.2018, the competent authority exercised its discretion by treating the intervening period as Extraordinary Leave and denied the salary on the principle of "No Work No Pay". In the present case the Petitioner has not challenged the impugned order dated 09.06.2018 in entirety, rather has only challenged the part of the impugned order dated 09.06.2018, wherein direction for treating the intervening period as Extraordinary Leave with "No Work No Pay" has been passed.

18. In the opinion of this Court, though the impugned order dated 09.06.2018, has been passed stating interalia that the intervening period shall be treated as Extraordinary Leave and no allowances or payment shall be made for the said period on account of "No Work No Pay", but nothing in the record of the instant case, reveals or suggests that any notice prior to passing such order, was ever served upon the Petitioner as per Rule 12 of Bihar Government Servants (CCA) Rules, 2005 and Rule 97 of Bihar Service Code, 1979, nor there is any whisper of this fact in the impugned order.

19. In the facts of the present case as stated hereinabove, this Court is of the view that the order with regards to non - payment of the salary, allowances or pay, for the intervening period i.e. from 02.07.2013 to 18.01.2018, treating it to be Extraordinary Leave, has been passed without according an opportunity of hearing to the Petitioner, which is in complete violation of principles of natural justice.



20. Consequently, this Court deems it fit and proper to set aside the part of impugned order dated 09.06.2018, only to the extent of treating the intervening period as Extraordinary Leave Period and consequently, directing for non-payment of back wages for the intervening period.

21. The respondents are directed to reconsider the claim of the Petitioner for back wages in light of the procedure outlined under Rules of Bihar Government Servants (CCA) Rules, 2005 and Bihar Service Code, 1979. A reasoned and speaking order regarding payment of back wages shall be passed in accordance with law after giving an opportunity of hearing to the petitioner, within three months from date of production of this judgment.

22. The writ petition is allowed to the aforesaid extent.

23. There shall be no order as to costs.

(Kumar Manish, J)

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