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Court : Patna

Decided On : Jul-29-2002

Judge : Sachchidanand Jha and T.P. Singh, JJ.

Appeal No. : Civil Writ Jurisdiction Case Nos. 11516 and 11758 of 2001

Appellant : Radha Kumari and anr.

Respondent : The State of Bihar and ors.

Disposition : Petitions Allowed

Judgement :

Sachchidanand Jha, J.

1. The dispute in these two writ petitions relates to payment of salary and the point for consideration is whether pending enquiry as to genuineness of the appointment salary can be stopped to the employees.

2. The facts of CWJC No. 11516/2001 briefly stated are that the petitioner upon successful completion of her Auxiliary Nursing and Midwifery training course at Sitamarhi and registration with the Bihar Nurses Registration Council, was appointed as Auxiliary Nurse and Midwife (ANM) on 13.12.1982. The appointment was made by the Deputy Director Health Services (Family Welfare) from a panel in which name of the petitioner was at serial No. 184. She was placed at the disposal

of the Civil Surgeon-cum-Chief Medical Officer, Sitamarhi and was posted at Primary Health Centre, Belsund. Later on 7.9.1990, on her representation on the ground of her husband's posting at Baniapur in the district of Saran, her service was placed at the disposal of Civil Surgeon-cum-Chief Medical Officer, Saran on transfer. On 16.10.1990 she was relieved by the Incharge Medical Officer, Primary Health Centre, Belsand. On her joining the office of Civil Surgeon-cum-Chief Medical Officer, Saran she was posted at Primary Health Centre, Baniapur. The petitioner has been working there since then. All on a sudden on 15.3.2001 a general notice was issued vide Memo No. 215(4) of the Secretary, Department of Health Medical Education and Family Welfare calling upon persons concerned to submit show cause within a week as to why their appointment be not cancelled. The notice mentioned that their appointment had been found to be doubtful in the enquiry. The name of the petitioner figured at serial No. 102 of the list. In the copy portion of the notice the concerned Civil Surgeons, namely, Civil Surgeons of Saran, Siwan and Gopalganj districts were directed not to take work from the persons concerned or to pay salary to them. They were also directed to forward the show cause to be filed by the concerned persons along with the comments and names of the persons who had made the impugned appointments. Pursuant to the said notice/order salary of the petitioner has been stopped and she has been prohibited from working.

3. The case of the petitioner of CWJC No. 11758/2001 is similar. She was appointed in 1986 on completion of her Auxiliary Nursing and Midwifery Training course and registration with the Bihar Nurses Registration Council and posted at Kuchaikot in the district of Gopalganj. On 27.6.1987 vide Memo No. 224 the Deputy Director, Health Services, Saran Division, transferred her services from Kuchaikot at the disposal of the Civil Surgeon, Siwan, where she was posted at Primary Health Centre, Pachrukhi. All went well until pursuant to aforementioned notice/order dated 15.3.2001 salary was stopped and work was also stopped being taken from her on the ground that her appointment was found to be doubtful in the enquiry.

4. The petitioners do not challenge the power of the respondents authorities to make enquiry regarding the genuineness or otherwise of their appointment. Their

only grievance is that pending such enquiry salary cannot be stopped. It is submitted that even where an employee is placed under suspension on account of some misconduct pending or in contemplation of department proceeding, he is entitled to subsistence allowance, in the instant case, even though there is no allegation of their committing any misconduct, they are being denied salary putting them in a worse position than an employee under suspension. It was also submitted that in any view, if the authorities bona fide believe that the appointment of the petitioners suffers from any infirmity touching the root of the matter, they should have completed the enquiry within reasonable time and communicated its result to the petitioners so that in the event of adverse decision, they could challenge; the same in a Court of law in accordance with law. The position in the instant case is that neither the enquiry has been concluded for more than a year nor the work is being taken from the petitioners nor salary is being paid to them affecting their livelihood and thereby violating their fundamental right under Article 21 of the Constitution. In support of the contention reliance is placed on a decision of a learned Single Judge of this Court in the case of Ram Pati Mishra and ors. v. State of Bihar and Ors. 2001 (3) (sic) 462.

5. The case of the respondents is that on receipt of complaints regarding large scale illegal/irregular appointments in the Health Department in the districts of Saran, Siwan and Gopalganj and elsewhere, the Chief Secretary, Government of Bihar, vide his letter dated 19.6.1999 directed the Divisional Commissioners, to make enquiry. The Divisional Commissioner, Saran identified the persons whose appointments were doubtful. Their names were forwarded to the Health Department. In these circumstances, on 15.3.2001 direction was issued to make full-fledged enquiry in respect of the validity or otherwise of the appointment of the persons concerned with a further direction not to pay salary or take work from them.

6. The learned Single Judge before whom the petitions came up for hearing expressed reservation about the correctness of the decision in the case of Ram Pati Mishra (Supra) and referred the cases to Division Bench for hearing. The learned Judge observed that when the State Government is prima facie satisfied that a large number of fraudulent appointments were made, nothing prevents the

Stats Government to direct the authority not to take work or pay salary to such employees, in case it is found, after enquiry, that the petitioners procured appointments by fraudulent means, payment of salary to such employees would be absolutely illegal and recovery thereof from them would be difficult. The employees may resist recovery on the ground that they had worked in the meanwhile and no recovery should be made. On the other hand, in case after enquiry it is found that the appointments were not fraudulent, they will not suffer as in such case they would be entitled for the salary for the period they had not worked. In other words, in case of success in the enquiry, they can be compensated whereas in the case of failure the State will suffer.

7. At this stage the relevant observations in the case of Ram Pad Mishra (Supra) on which reliance is placed on behalf of the petitioners and the correctness of which has been doubted by the learned Single Judge, may be noticed in extenso as under:

From the order, as contained in Annexure 9, perse it appears that pending inquiries, the authorities have directed not to take work and not to pay salary to the petitioners. In my opinion, the direction aforesaid is wholly unjustified. The authorities firstly could have proceeded with the inquiry and in case, they would have been satisfied that such employees like the petitioners were not appointed in consonance with the provisions of Articles 14 and 16 of the Constitution of India, they could have issued necessary direction for removing them from service. The procedure adopted by the authorities, therefore, must be held to be wholly unwarranted in law. A large number of cases are everyday coming before this Court against like directions.

8. When these cases were taken up before this Bench, on reference, the Court observed that while it is open to the concerned authorities not to taken work from an employee and no employee can claim such a right., but in the absence of any rule salary cannot be denied to them pending enquiry in view of decisions of the Apex Court. The learned Additional Advocate General was directed to take instructions on the point. No provision of law empowering the authorities to withhold salary pending enquiry of the kind has been brought to our notice at the

time of final hearing.

9. Before referring to the decisions which have bearing on the point at issue it is relevant to mention here that the enquiry said to have been held by the Divisional Commissioner pursuant to the directive of Chief Secretary dated 19.6.1999 was ex parte, in which the petitioners were not given any opportunity of hearing. The Divisional Commissioner appears to have made some kind of enquiry on the basis of records and submitted his findings. So far as the petitioner of CWJC No. 9709/2001 is concerned, the validity of her appointment has been doubted only on the ground that she had come to Chapra (Saran) on transfer from Sitamarhi but the confirmation of her transfer was not received. So far as the petitioner of CWJC No. 11758/2001 is concerned, relevant part of the order has not been brought on record and therefore, it is not known on what ground her appointment has been found to be doubtful. Be that as it may, it is not in dispute that the finding was arrived at behind the back of the petitioners. As a matter of fact it seems to be an admitted position that the enquiry held by the Divisional Commissioner was in the nature of fact finding enquiry. It is only pursuant to the order dated 15.3.2001 that full-fledged enquiry is being held in which the petitioners have been asked to submit show cause against proposed cancellation of their appointment.

10. In the case of *Management of Hotel Imperial and Ors. v. Hotel Workers' Union and Ors.* : (1959) IILLJ544SC , the Apex Court observed:

It is now well settled that power to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the contract, or of an express term in the contract itself. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension. Where, however, there is power to suspend either in the contract of employment or in the statute or the rules framed thereunder, the suspension has the effect of temporarily suspending the relation of master and servant with the

consequence that the servant is not bound to render service and the master is not bound to pay.

(Emphasis added)

11. The observation occurring in the above passage 'the power to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant' was explained by the same learned Judge in *T. Cajee v. U. Jormanik Siem and Anr.* : (1961)ILLJ652SC , wherein his Lordship stated that *Hotel Imperial (Supra)* did not lay down that master could not forbid the servant from working while he was inquiring into his conduct with a view to removing him from service. It was specifically said there that if the master does so, namely, forbids the servant to work and thus in fact suspends him as an interim measure he will have to pay the wages during the period of interim suspension. It would be useful to quote the relevant observations in the said judgment as under:

In the circumstances, therefore, though an order of interim suspension could be made against the respondent while inquiry into his conduct with a view to his ultimate removal is going on, his remuneration according to the terms and conditions communicated to him cannot be withheld unless there is some statute or rules framed thereunder which would justify the withholding of the whole or part of the remuneration.

(Emphasis added)

Again, in the case of *R.P. Kapoor v. Union of India* : (1966)ILLJ164SC , the Court observed that:

An order of interim suspension could be passed against an employee while inquiry was pending into his conduct even though there was no specific provision to that effect in his terms of appointment or in the rules. But in such a case he would be entitled to his remuneration for the period of his interim suspension if there is no statute or rule existing under which it could be withheld.

(Emphasis added)

12. It is unnecessary to multiply decision on the point which are available in plenty. I would however like to refer to a recent decision of the Supreme Court in the Case of Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. and Anr. : (1999)ILLJ 1094 SC . The decision was rendered in a somewhat different context but certain observations made therein appear to be apposite in the context of the present case. The case arose from a departmental proceeding in which the appellant was awarded the punishment of dismissal from service. One of the contentions challenging the validity of the departmental proceeding and the ultimate order of dismissal was that subsistence allowance had not been paid during the period of suspension and enquiry. In this context the Court observed that 'to place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. It has even received statutory recognition under service rules framed by various authorities, including Government of India and the State Governments. Even under the General Clauses Act 1897 this right is conceded to the employer by Section 16 which inter alia provides power to appoint includes power to suspend or dismiss. However an order of suspension does not put an end to an employee's service and he continues to be member of service though he is not permitted to work and is paid only subsistence allowance which is less than his salary'. The Court noticed certain observations in the case of O.P. Gupta v. Union of India (1997) 4 SCC 328 and it would be useful to quote the same as under:

An order of suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of the service in spite of the order of suspension. The real effect of suspension as explained by this Court in Khem Chand v. Union of India is that he continues to be a member of the Government service but is not permitted to work and further during the period of suspension he is paid only some allowance-generally called subsistence allowance-which is normally less than the salary instead of pay and allowance he would have been entitled to if he had not been suspended. There is no doubt that an order of suspension, unless the departmental enquiry is concluded within a reasonable time, affects a Government servant injuriously. The very expression 'subsistence allowance' has an undeniable penal significance. The dictionary meaning of the word 'subsist' as given in Shorter Oxford' English Dictionary, Vol. II

at P. 2171 is 'to remain alive' as on food; to continue to exist. 'Subsistence' means-means of supporting life, especially a minimum livelihood.

The Court then observed:

If, therefore, even that amount is not paid, then the very object of paying the reduced salary to the employee during the period of suspension would be frustrated. The act of non-payment of subsistence allowance can be likened to slow-poisoning as the employee, if not permitted to sustain himself on account of non-payment of subsistence allowance, would gradually starve himself to death. On joining Government service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Government. The Government, only because it has the power to appoint does not become the master of the body and soul of the employee. The Government by providing job opportunities to its citizen only fulfils its obligations under the Constitution, including the Directive Principles of State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer, like instrumentalities of the Government or statutory or autonomous corporations, etc. is regulated by the terms of contract of service or service rules made by the Centre or State Government under the proviso to Article 309 of the Constitution or other statutory rules including certified standing orders. The fundamental rights, including the rights to life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision for payment of subsistence allowance made in the service rules only ensures non-violation of the right to life of the employee.

13. It is true that the above mentioned cases were decided in the context of departmental proceeding arising from in-service misconduct committed by the employees. The instant case is not one of any in-service misconduct or departmental proceeding. The enquiry relates to illegalities/irregularities or fraud etc. prior to the appointment. The question is whether the legal position in the matter of employer's liability to pay salary during the pendency of such enquiry would be different from his liability to pay salary during pendency of departmental

proceeding. It is well settled by the above mentioned decisions that in the absence of any statute or rules framed thereunder, salary cannot be withheld to the employee, though it is open to the employer not to take work from him. I do not think the legal position would be different in the case of an enquiry relating to 'pre-appointment' illegalities or irregularities in the matter of appointment.

14. In *V.P. Gindroniya v. State of Madhya Pradesh and Anr.* : (1970) IILLJ143SC , the Apex Court observed:

Three kinds of suspension are known to law. A public servant may be suspended as a mode of punishment or he may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspension. Lastly he may merely be forbidden from discharging his duties during the pendency of an enquiry against him which act is also called suspension. The right to suspend as a measure of punishment as well as the right to suspend the contract of service during the pendency of an enquiry are both regulated by the contract of employment or the provisions regulating the conditions of service. But the last category of suspension referred to earlier is the right of the master to forbid his servant from doing the work which he had to do under the terms of the contract of service or the provisions governing his conditions of service at the same time keeping in force the master's obligations under the contract, in other words the master may ask his servant to refrain from rendering his service but he must fulfil his part of the contract.

15. In my opinion the cases in hand may be said to be covered by the third category mentioned above. Forbidding an employee from discharging his duties during pendency of any enquiry also amounts to suspension. An employee can be placed under suspension not only during pendency of departmental proceeding. Where no departmental proceeding is pending but still an employee is forbidden from discharging his duties during pendency of some enquiry, would also amount to his suspension, but while it is permissible to the employer to do so, he is liable to pay him his remuneration.

16. The position of course would be different if there were statutory provision under which such enquiry is to be held. In that case the question of salary etc.

would abide by the terms of the statutory provisions. But as seen above there is no rule on the point under which the enquiry is being held, if that is so, while enquiry may proceed in the meantime, salary cannot be withheld. Indeed, non-payment of salary would place an employee in much worse position than an employee who is facing regular departmental proceeding on charge of in-service misconduct. If an employee facing regular departmental proceeding is entitled to subsistence allowance as per the rules applicable to him and non-payment thereof is likely to vitiate the departmental proceeding itself as held in Capt. M. Paul Anthoney's case (Supra), it is beyond my comprehension as to how during pendency of an enquiry relating to pre-appointment conduct of the employee, his salary could be withheld.

17. Learned Additional Advocate General reminded us of the large scale illegal and fraudulent appointments made in different departments in the State of Bihar including the Health Department and submitted that a person who has secured appointment by fraudulent means should not be held entitled to salary as of right. He placed reliance on certain observations in the case of Rita Mishra and Ors. v. Director Primary Education Bihar and Ors. 1988 BLJR 1, occurring in paras 39, 40 and 41 of the judgment. The claim for salary in that case had arisen in a different context. The appointment had been held to be illegal and the question for consideration was whether the persons concerned could claim salary for the work performed by them as a matter of right. In the instant case any conclusion of that kind is yet to be reached. The enquiry which resulted in stoppage of salary was *exparte* and the petitioners had no opportunity to explain that their appointment was valid one. As a matter of fact, as seen above, in the case of petitioner Radha Kumari, the only ground on which her appointment has been described as doubtful is that confirmation of the order of her transfer to Saran is wanting. I wonder if on that ground, the appointment can be held to be illegal. Surely, the petitioner cannot be expected to bring 'confirmation' of the order by which she had been transferred, that is a matter between the two offices or authorities for which any omission on their part should not result in deprivation of salary.

18. In fairness to the respondents, however, I must observe that the possibility of certain appointment being illegal or fraudulent, generally speaking, cannot be ruled out, but this is a flatter which has to be enquired into. Though it is difficult to lay

down parameters of enquiry with exhaustive illustrations, if in an appropriate case, the concerned authority being bona fide of the opinion that the appointment is fake one, calls upon the employee to produce appointment letter and if the employee fails to produce the appointment letter, a strong doubt may arise as to the genuineness of his appointment and in such a case salary may be stopped. But obviously this can be done only after asking him to produce the appointment letter etc., thereby giving him an opportunity of hearing. It is well known that rules of natural justice are not like strait-jacket formulae and their application depends on facts and circumstances and varies from case to case. Thus in a case where the appointment is held to be illegal on the ground of violation of the rules or circulars, it may be proper to make detailed examination calling upon the employee to produce evidence in support of his claim. However, if on bald suspicion that the appointment was secured by illegal or fraudulent means, salary were to be stopped, it may result in grave injustice to the person concerned. It has to be kept in mind that duration of enquiry is entirely in the hands of the concerned authority. An enquiry of this nature can be concluded, if not within weeks, within few months, if the authorities only decide to do so. It goes saying that if the employee does not cooperate in the enquiry, it is open to the authorities to proceed exparte and in such a case the employee may not allege violation of the rules of natural justice.

19. In the instant cases, as seen above, enquiry is said to be pending since March 2001 i.e. for more than a year. There can be no justification for, nor any attempt was made to justify, such delay. The uncontroverted case of the petitioners is that they have already filed show cause. It was thus open to the authorities to take a decision one way or other. No decision having been taken and the petitioners having been left in the lurch to fend for themselves the action of the authorities cannot be said to be just and proper.

20. In the above premises these writ petitioner are allowed. The respondents are directed to pay the arrear as well as current salary to the petitioners in accordance with law subject to the result of the enquiry. No order as to costs.

T.P. Singh, J.

I agree.

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