

**Brahamdeo Singh Vs. the State of Bihar and ors.**

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**Court :** Patna

**Decided On :** May-18-2007

**Judge :** A.K. Tripathi, J.

**Acts :** Bihar Municipal Act, 1922 - Sections 42; Municipal Officers and Servant (Appointment, Duties Discipline and Appeal) Rules

**Appeal No. :** C.W.J.C. No. 8152 of 2004

**Appellant :** Brahamdeo Singh

**Respondent :** The State of Bihar and ors.

**Advocate for Def. :** A K. Sharma, JC to AGG III and R.B. Verma, Adv.

**Advocate for Pet/Ap. :** U.N. Singh, G.K. Singh and P. Kumari, Adv.

**Disposition :** Application allowed

**Judgement :**

**A.K. Tripathi, J.**

1. Heard learned Counsel for the parties.

2. Petitioner was initially appointed as literate peon in the year 1970 under Siwan Municipality and later came to be promoted to the post of clerk. When he was suspended on 15.7.2000 he was holding the post of cashier. Suspension had to be

effected because of certain financial bungling as was alleged in the chargesheet dated 22.8.2000 and show cause was issued to the petitioner on 21.11.2000. In addition to that it seems that criminal case was also instituted against the petitioner for similar charge of defalcation etc. A Money Suit was also filed against the petitioner along with some other employees. An Enquiry officer in the departmental proceeding was appointed and he examined the matter and the show cause filed on behalf of the petitioner. After some deliberation he returned the file of the departmental enquiry to the District Magistrate with a note that since a criminal case has already been filed against the petitioner there was no occasion for the enquiry officer to proceed in the matter.

3. Matter rested there for a while. Two things must be pointed out straightway in the order that when the petitioner was suspended and the departmental enquiry was initiated the Municipality under question was under supersession. By virtue of that supersession order the District Magistrate came to exercise authority and power over the body in question. Subsequently on 16.6.2002 after due election the Municipal body was restored and the body was being run in terms of the Bihar Municipal Act, 1922 as it then existed. In so far as the case of the petitioner is concerned, it seems that despite the constitution of the Municipal body and vesting of authority in the elected body, the District Magistrate, may be by omission or over sight continued to exercise his authority in the matter relating to petitioner. This is so as on 2.12.2002 he reverted the records of the proceeding to the enquiry officer directing him to hold an enquiry despite his earlier opinion or objection. Based on the direction of the District Magistrate the enquiry officer proceeded in the matter. Regular enquiry was held against the petitioner and a report was submitted to the District Magistrate on 6.11.2003. Since nothing was happening after submission of the enquiry report. Petitioner filed writ namely C.W.J.C.No. 1492 of 2004. The grievance of the petitioner was that though the enquiry report was submitted against him to the District Magistrate but no final order was passed in the matter. That was the limited prayer of the petitioner as one can make out from the order of the earlier writ application. Vide order dated 24.2.2004 a Bench of this Court directed the District Magistrate to pass a final order on or before 31st May 2004. The order also states that if no final order is passed on or before that date then the suspension of the petitioner shall stand

revoked. Petitioner was directed to appear before the District Magistrate.

4. It seems that thereafter the District Magistrate has passed the order against the petitioner. What order was passed by him was not communicated but it seems that the copy of the order was forwarded to the Executive Officer. Siwan Nagar Parishad with a direction to pass appropriate order of punishment against the petitioner. There is no dispute that the enquiry officer did find the petitioner guilty of the charges and based on that finding the District Magistrate had directed imposition of punishment on the petitioner. The final order of punishment as contained in annexure-10 was communicated by the Executive Officer of Siwan Nagar Parishad. Annexure-10 is the impugned order therefore in the present writ application. It is not necessary to go into the details of the punishment which has been imposed and communicated to the petitioner because this is not the issue in the present writ application.

5. Petitioner has challenged the very order of punishment which has been imposed upon him on the decision taken by the District Magistrate. His submission is that after the Municipality was restored on 16.6.2002 as an independent statutory body under Bihar Municipal Act all powers were vested back in the Municipal Commissioner. Once the period of supersession was over there was no occasion for the District Magistrate to exercise any authority over the matters relating to a duly constituted Municipal body. He submits that the Bihar Municipal Act is a composite code by itself and based on Section 42 certain rules have already been formulated for establishment and running of the Municipal body. He brings to my notice one such rule which governs the service conditions etc. of Municipal employees. The rule in question is Municipal Officers and Servant (Appointment, Duties Discipline and Appeal) Rules. He submits that action which was taken against the petitioner has to be taken under these rules more so after the Municipal body was restored to its own position and when it was no longer under supersession. The basic vital question raised by the petitioner is whether the District Magistrate has due authority to direct holding of an enquiry and pass order of Punishment against him after 16.6.2002?

6. Learned Counsel for the State as well as the Nagar Parishad. Siwan have made their submissions in favour of the order of punishment. They submit that petitioner was involved in defalcation of large amount of public money and therefore the enquiry was held in this background. Enquiry continued for a long period of time and since the petitioner himself had approached this High Court earlier seeking a direction upon the District Magistrate to take a final decision on the enquiry report. It is not open to him to question or challenge the order of punishment which came to be passed by District Magistrate. They submit that petitioner subjected himself to the jurisdiction of the District Magistrate and it was by virtue of judicial order the District Magistrate came to pass the order of punishment which was communicated to the petitioner through the Executive Officer contained in annexure-10. They further submit that the matter came to rest and there is no occasion for this Court to interfere with the punishment order.

7. This fact is not under dispute that the petitioner moved this Court earlier for a direction upon the District Magistrate to dispose of the matter since he was under suspension for a long period of time and no final decision based on the enquiry report was coming forthwith. But that does not mean that the District Magistrate gets power which is otherwise not vested in him. It is neither for the petitioner or for a court to create a jurisdiction in person or a body when the law does not envisage so. The basic fact is that when the order of punishment came to be passed against the petitioner by the District Magistrate he had lost all authority over the Municipal body. After restoration of the Municipality the powers had to be exercised by the Municipal Commissioner in terms of the Act and various rules governing the situation.

8. Petitioner relies on a decision rendered by a Constitution Bench in the case of Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors. reported in : AIR 1986 SC180 . He relies on this decision in the background that pavement dwellers of Bombay based on undertaking given by them in the litigations before the High Court were subsequently sort to be evicted. The issue thereafter travelled to the Hon'ble Supreme Court. One of the basic abjection which was taken by Bombay Municipal Corporation was that since the pavement dwellers had given an undertaking to a judicial forum it was not open to resile from the same. A plea was

taken that they shall not be bound by such direction given in this regard. One of the question which was raised in this decision was whether the plea of estoppel or waiver can be raised in the situation of this kind. In paragraphs 28 and 32 of the decision there is detailed discussion on this point and the apex Court came to a conclusion that there cannot be any waiver or estoppel so far as the matter of fundamental rights and principles are concerned.

9. Though this decision is not fully applicable to the present case of the petitioner but then there are decision in this regard that there cannot be any estoppel or concession in the face of statutory provision. Mere concession is not enough if the law to this extent does not permit so.

10. The fact is that once the Municipal body was reconstituted on 16.6.2002 the District Magistrate ought to have transferred the file relating to the disciplinary proceeding to the Municipality. There was no occasion for him to proceed in the matter further. He should have allowed and permitted the Municipal body to proceed in the case in terms of the statutory rules and regulations in this regard. There was actually no occasion for the District Magistrate to direct holding of an enquiry after 16.6.2002, accepting the enquiry report in the year 2003 and also pass order imposing punishment on the petitioner by virtue of his direction contained in annexure-1. Since the District Magistrate did not have due authority and power to exercise on the employee of the Municipal Corporation therefore he cannot be said to be the disciplinary authority under the statute who can impose punishment against the petitioner. In this given background this Court has no option but to quash the order contained in annexure-1 along with the order dated 13.7.2004 contained in annexure-10.

11. This Court however does not absolve the Petitioner of his wrong doing. Though the law and technicality is in his favour but he still has to account for his omission or commission which he committed as cashier of the Municipal body in question. In the given facts therefore the Court directs the respondents. Executive Officer of Nagar Parishad. Siwan to appoint a fresh enquiry officer in this regard based on the charges earlier which was communicated to the petitioner on 22.9.2000. A regular enquiry thereafter shall be held after giving fullest opportunity

to the petitioner to defend himself and the outcome of the enquiry report thereafter shall govern the issue whether the petitioner is culpable of the offence he has been charged or he requires exoneration in the matter. If the culpability of the petitioner is found in the enquiry report the disciplinary authority i.e. Municipal Commissioner shall thereafter decide as to the punishment which the petitioner shall be entitled to in the given facts and circumstances of the case.

12. Since the matter is pending for a long period of time it is hoped and expected that the enquiry in this regard shall be completed within a period of six months. Petitioner is directed to render fullest cooperation in the matter in his own interest.

13. This writ application stands allowed to the extent indicate above.

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