

**Jagdish Sah Vs. the State of Bihar and Others**

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**Court :** Patna

**Decided On :** May-17-2011

**Judge :** Ramesh Kumar Datta, J.

**Acts :** [Constitution of India](#) - Article 226; Bihar Pension Rules - Rule 43(b)

**Appeal No. :** CIVIL WRIT JURISDICTION CASE No.6421 OF 2003

**Appellant :** Jagdish Sah

**Respondent :** The State of Bihar and Others

**Advocate for Def. :** Mr.Piyush Lal, Adv.

**Advocate for Pet/Ap. :** Ashwini Kumar Singh, Anisur Rahman, Sanjay Kr., Adv.

**Judgement :**

1. Heard learned counsel for the petitioner and learned counsel for the respondent Bihar School Examination Board.
2. The petitioner seeks quashing of the Office Order dated 28.1.2003 of the Chairman of Bihar School Examination Board by which the petitioner has been dismissed from service and also the Office Order dated 2.5.2003 by which the appeal filed by the petitioner has been rejected and for other consequential relief.
3. The petitioner at the relevant time was working as Assistant in the respondent Board. On 31.3.2000 he was issued a show cause notice charging him for

preparing wrong mark-sheet and issuing duplicate certificate of Gopal Prasad of supplementary examination of 1978. Thereafter the petitioner was placed under suspension by order dated 13.10.2000 and was served with a memo of charge dated 6.1.2001 directing him to file written statement of defence within 15 days. It is the case of the petitioner that on account of non-supply of papers that he had asked for immediately after service of show cause notice and the charge memo he was unable to file a proper show cause in the matter. Admitted position is that thereafter the Enquiry Officer submitted his enquiry report dated 24.5.2001 holding the petitioner guilty of preparing mark-sheet, without issuing notice to the petitioner to participate in the enquiry proceedings and only on the basis of statement of defence filed by the petitioner and looking into the concerned records. The claim of the petitioner is that he was served with charge memo without any list of witnesses or list of documents on which the respondents neither intended to rely nor were those supplied to him thereafter.

In his enquiry report the Enquiry Officer found the petitioner guilty of having issued mark-sheet to the concerned student despite the concerned page of the original tabulation register being clearly torn and re-pasted and the marks against the concerned student Gopal Prasad appearing to have been erased and re-typed, different from the typing of the marks of the other students on the same page. The petitioner was not found personally guilty of tampering with the mark-sheet and it was held that in view of the procedure for taking out the original tabulation register from the custody of the Secretary of the Board the Section Officer and the concerned Assistant of the record room also appear to be involved. The petitioner was issued a second show notice cause and thereafter by the impugned order dated 28.1.2003 it was held that the petitioner had been found guilty of issuing mark-sheet and of forgery of documents and dismissed from service. Against the order of dismissal the petitioner filed an appeal on 11.3.2003 but the same was also dismissed by the appellate authority by order dated 2.5.2003.

4. Learned counsel for the petitioner submits that the entire departmental proceeding is vitiated in law as it has been conducted giving a complete go-bye to the statutory regulation contained in the Service Statute in Chapter X of the Bihar

School Examination Board Regulations. It is urged that Regulations 53 to 55 laying down the procedure for conduct of departmental proceeding have been given a complete go-bye in the matter as the procedure for major punishment as prescribed therein has not been followed. It is submitted that as a matter of fact no enquiry proceeding was held and merely on the issue of charge memo that too without any list of witnesses or list of documents on the show cause reply filed by the petitioner the Enquiry Officer on his own by considering the said show cause and looking into the documents has submitted the enquiry report. At no time the petitioner was called by the Enquiry Officer or given any opportunity of personal hearing before passing of the order of major punishment as required by the Regulations.

5. It is further submitted by learned counsel that despite several requests made by the petitioner to supply the documents the same was not supplied to him and he was merely asked to peruse the same.

6. It is also the case of learned counsel for the petitioner that defence of the petitioner has not been dealt with by the disciplinary authority or the appellate authority. It is submitted that the Enquiry Officer had not held the petitioner guilty of tampering yet on his own the disciplinary authority has made the observation that the petitioner has been found guilty of tampering and passed the impugned order. It is submitted that the said action would clearly go to show that he was bent upon dismissal of the petitioner on a wrong finding.

7. It is also contended by learned counsel that the petitioner has not been supplied the list of documents and list of witnesses along with the charge memo and in that view of the matter the documents not mentioned in the charge memo could not have been relied upon by the disciplinary authority or the appellate authority to have come to the finding against the petitioner and punished him on that count.

In support of the same, learned counsel relies upon a decision of the Apex Court in the case of Kuldeep Singh vs. Commissioner of Police and others (1999) 2 SCC 10, in paragraph-39 of which it has been held as follows:

**“39. From the findings recorded separately by the Deputy Commissioner of Police, it would appear that there is a voucher indicating payment of Rs.1000 to Rajpal Singh, one of the labourers, on 8.2.1990. This document was not mentioned in the charge-sheet in which only two documents were proposed to be relied upon against the appellant, namely, copy of the report of SHO Lajpat Nagar dated 5.3.1990 against the appellant and the copy of the labourers’ statement. This document has; therefore, to be excluded from consideration as it could not have been relied upon or even referred to by the Deputy Commissioner of Police. Moreover, according to the charge framed against the appellant, payment was made on 22.2.1990 and not on 8.2.1990 as indicated in the voucher and, therefore, the voucher for this reason also has to be excluded.”**

Learned counsel also relies upon a decision of the Supreme Court in the case of Narinder Mohan Arya vs. United India Insurance Co. Ltd. and others: (2006) 4 SCC 713, in the relevant part of paragraph-26 of which it has been held as follows :

**“26. In our opinion the learned Single Judge and consequently the Division Bench of the High Court did not pose unto themselves the correct question. The matter can be viewed from two angles. Despite limited jurisdiction a civil court, it was entitled to interfere in a case where the report of the enquiry officer is based on no evidence. xxxxx”**

8. It is the further contention of learned counsel that report of the enquiry officer as also the order of the disciplinary authority are perverse as they are not based upon any legal evidence since the entire proceedings were conducted behind the back of the petitioner. In support of the same, learned counsel relies upon a decision of the Supreme Court in the case of Central Bank of India Ltd. vs. Prakash Chand Jain: AIR 1969 SC 983, in the relevant part of paragraph-8 of

which it has been held as follows:

**“8. xxxxxxxx It is in this connection that importance attaches to the views expressed by this Court in the cases cited above where it was pointed out that a finding of a domestic tribunal may be perverse if it is not supported by any legal evidence. It is true that, in numerous cases, it has been held that domestic tribunals, like an Enquiry Officer, are not bound by the technical rules about evidence contained in the Indian Evidence Act; but it has nowhere been laid down that even substantive rules, which would form part of principles of natural justice, also can be ignored by the domestic tribunals. The principle that a fact sought to be proved must be supported by statements made in the presence of the person against whom the enquiry is held and that statements made behind the back of the person charged are not to be treated as substantive evidence, is one of the basic principles which cannot be ignored on the mere ground that domestic tribunals are not bound by the technical rules of procedure contained in the Evidence Act.xxxxxxxx”**

9. It is also urged by learned counsel for the petitioner that several points were raised by the petitioner in the memo of appeal including the fact that although there was no finding in the enquiry report that the petitioner was guilty of tampering yet the disciplinary authority asserted the same but the appellate authority did not at all advert to the said aspect of the matter.

10. Learned counsel for the respondent Bihar School Examination Board, on the other hand, has merely sought to rely upon the gravity of the offence committed by the petitioner. It is stated that thrice the mark-sheet has been issued to the same candidate that too from the original tabulation register in which the page concerning the said student was clearly torn and re-pasted and the marks given to him were in a different type from that of other candidates on the same page and thus it cannot be said that the petitioner has been wrongly found guilty of the charge while issuing the said mark-sheet.

11. It is also the contention of learned counsel for the respondent that the provisions of Regulation 54 require the employee while putting in a written statement of defence that he has to state whether he desires to be heard in person in respect of cases involving the punishment of reduction, removal or dismissal from service and having failed to ask for the same either at the time of filing written statement of defence or thereafter he would be deemed to have waived the requirement of the regulations regarding personal hearing and in the said circumstances no plea can be raised by him at a belated stage before this Court in this regard.

Learned counsel relies upon a decision of the Supreme Court in the case of State Bank of Patiala and others vs. S.K.Sharma: AIR 1996 SC 1669, in paragraph 32(4)(a) and (b) of which it has been held as follows :

**“32(4) (a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.**

**(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B.Karunakar, (1994 AIR SCW 1050).**

**The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.”**

12. It may be appropriate at this stage to consider Regulations 53 and 54(a) & (b), which are quoted below:

**“53. Procedure for punishment- When an employee is charged with an offence, every opportunity should be given to defend him and following procedure should be strictly observed-**

**(a) A memo of charges should be issued against him;**

**(b) A written statement of the defence if any offered should be obtained from him;**

**(c) An oral enquiry should be held, in respect of cases involving the penalty of reduction, removal or dismissal from service, and**

**(d) An order should be passed embodying the findings of the punishing authority.**

**54. Framing of Memorandum of charges: holding of oral enquiry and drafting of punishment order -**

**(a) The following instructions should be observed in framing a memorandum of charges-**

**(1) The grounds on which it is proposed to take action against an employee should be reduced to the form of definite charge or charges.**

**(2) A statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case, should invariably be recorded in the memorandum. In no circumstances, however,**

should an opinion or anything that can be constructed as opinions as to the guilt of the employee appear in the memorandum.

(3) The employee should be required, within a reasonable time to be specified in the memorandum, to put in a written statement of his defence. He should also be required to state whether he desires to be heard in person, in respect of cases involving the punishment of reduction, removal or dismissal from service.

(b) The circumstances in which an oral enquiry has to be held and the manner, in which it should be conducted, are detailed below:

(1) If the employee who has been charged with an offence involving the punishment of reduction, removal or dismissal from service, desires to be heard in person, an oral enquiry must be held. It is also open to the punishing authority to direct that an oral enquiry should be held, even if the employee does not ask for it.

(2) At the oral enquiry it is incumbent on the authority concerned to have oral evidence as to such of the allegations as are not admitted and to give the employee charged an opportunity

(a) To crossexamine the witnesses

(b) To give evidence in person and

(c) To have such witnesses called as he may wish provided that the officer conducting the enquiry may, for special and sufficient reason to be recorded in writing refuse to call a witness.

**(3) The proceeding of the oral enquiry should be reduced to writing and be signed by the enquiring officer and the employee charged.”**

It is evident from the aforesaid statutory regulations that issuance of memo of charge is a mandatory requirement therein and the requirement of submitting list of witnesses and list of documents on which the employer proposes to rely in proving the said charge follow as a matter of course. It is also provided that an oral enquiry should be held where the punishment of reduction, removal or dismissal from service is involved.

13. The submission of learned counsel for the respondent Board that the petitioner had waived the requirement by not stating in his written statement of defence or thereafter that he desires to be heard in person has no legs to stand in view of the mandatory nature of the provisions regarding holding of oral enquiry. It is not for the proceedee to suo motu state as to whether he wishes to be heard in person but for the disciplinary authority to ensure that he is required to state whether he desires to be heard in person where a major punishment is to be given to him. There is nothing in the material on the record to show that the petitioner was ever required to state whether he desires to be heard in person. In fact it has been kept open to the punishing authority to direct that oral enquiry should be held even if the employee does not ask for it. Thus it is evident from the said provisions that the requirement of oral enquiry in case of major punishment is to be treated as mandatory unless the employee on being given an opportunity specifically states that he does not desire to be heard in person. There is nothing on the record to show that the petitioner at any time has stated that he did not desire to be heard in person. In the said circumstances, there can be no question of any waiver by the petitioner of a right which he was at no time asked to exercise in terms of the statutory provisions.

14. Moreover, this Court is of the view that it cannot be held in the present case that any departmental enquiry for major punishment has been held. It is only in the case of minor punishment that a show cause may be asked from an employee

and upon receipt of his reply the disciplinary authority may pass an order inflicting punishment on not being satisfied with the same but when a major punishment is to be inflicted it is incumbent upon the enquiry officer to fix a date directing the petitioner to appear before him and even if the employer does not intend to examine any witness and to rely only upon documents, the petitioner must be given an opportunity to show that those documents did not point towards his guilt and cannot be relied upon in support of the charge. In the present matter, no such notice was issued to the petitioner to appear before the enquiry officer and everything has been done behind the back of the petitioner depriving him of the opportunity to examine and assail the documents which have been relied upon by the enquiry officer and also the opportunity to produce his own witnesses or to give evidence in person. Thus, the enquiry proceedings have to be held to be vitiated and not to be relied upon for passing any order of punishment.

15. Lastly, there is substantial force in the submission of learned counsel for the petitioner that the documents which were not mentioned in the charge memo cannot be relied upon for holding the charges to be proved. It is evident that in the present matter the petitioner was not made aware of the documents on which the respondent-Board intended to rely upon for proving the charges as no list of documents was supplied to the petitioner either with the charge memo or at any subsequent stage. In this regard, it makes no difference that the petitioner had perused certain documents. Thus the findings of the enquiry officer have to be held to be based on no evidence. The petitioner having been unaware of the documents, in the light of the decision of the Apex Court in the case of Kuldeep Singh (*supra*), all those documents have to be excluded from consideration and they cannot be relied upon or even referred to by the disciplinary authority.

16. This Court also finds that the order of the disciplinary authority suffers from complete no application of mind as he has held that the enquiry officer had found the petitioner guilty of tampering; whereas there is no such finding by the enquiry officer.

17. Similarly, the appellate authority has not applied his mind to the aforesaid fact specifically raised by the petitioner in his memo of appeal quoting findings of the disciplinary authority, as the order of the appellate authority does not even advert to the same.

18. In any view of the matter, on the basis of what has been discussed above, the impugned orders dated 28.1.2003 passed by the disciplinary authority and the order dated 2.5.2003 passed by the appellate authority cannot be allowed to stand. They are, accordingly, quashed.

19. Normally when this Court is satisfied that the impugned order is in violation of the principles of natural justice or the statutory procedure, the matter is remanded to the respondent authorities for proceeding afresh in the matter from the stage the disciplinary proceedings had become vitiated. In the present case, however, it may not be possible to do so as the petitioner during the pendency of the writ petition has attained the age of superannuation on 30.6.2009. Learned counsel for the respondent-Board was unable to show any provision in the service regulations under which a retired employee of the Board could be proceeded against departmentally. On specific enquiry of this Court as to whether Rule 43(b) of the Bihar Pension Rules applies to the employees of the respondent Board learned counsel for the Board has filed certain resolutions of the Board but the same do not specifically show any adoption of Rule 43(b) of the Bihar Pension Rules by the respondent Board.

In the said circumstances, it will not be open to the respondents to proceed further departmentally against the petitioner on account of his having crossed the age of superannuation.

20. The writ application is, accordingly, allowed. The petitioner would be entitled to all consequential benefits on account of setting aside of the order of dismissal of the disciplinary authority and of the appellate authority.