A

KIRTI BHUSAN SINGH

v.

STATE OF BIHAR & ORS.

B

JULY 16, 1986

[E.S. VENKATARAMIAH AND V. BALAKRISHNA ERADI, JJ.]

C *Invalid pension—Recalling nearly after two years the permission granted, during the pendency of the departmental enquiry, to an employee to retire on invalid pension and dismissing him-Validity of the orders—Bihar Service Code, Rules 73 (f) and Bihar Pension Rules, Rule 116 applicability of.*

D **The appellant was a clerk in the Excise Department of the State of Bihar. In a disciplinary proceeding instituted against him, the Inquiring Officer found that six out of seventeen charges framed against him had been established and submitted his report accordingly on 9.11.1960. The Excise Commissioner accepted the report of the Inquiring Officer and issued a show cause notice dated 8.9.1961 to the appellant as to why**

E **he should not be removed from service. The appellant submitted his reply to the said notice on 1.11.1961. After the submission of the Report by the Inquiring Officer, the civil surgeon of the area issued a certificate to the effect that the appellant was an invalid and he could not discharge his duties properly in the state of his health. On 31.1.1962, an order was passed by the Excise Commissioner directing the retirement of the**

F **appellant on invalid pension under Rule 116 of the Bihar Pension Rules with effect from 19.7.1961. On 5.10.1963 the Government of Bihar passed an order revoking the order of retirement under Rule 73(f) of the Bihar Service Code and thereafter the Excise Commissioner passed an order on 1.11.1963 dismissing the appellant from service. The appellant challenged the said order of revocation of the order of retirement**

G **and the order of dismissal passed later on in the Patna High Court. The High Court dismissed the writ petition but granted a certificate of fitness to appeal.**

Allowing the appeal, the Court,

H **HELD: 1.1 In the absence of a provision which entitled the State**

Government to revoke an order of retirement on medical grounds which had become effective and final, the order dated 5.10.1963 passed by the State Government revoking the order of retirement is without the authority of law. The order of dismissal passed thereafter is also a nullity. [234E-F]

1.2. The expression "compulsory retirement" found in Rule 73(f) of the Bihar Service Code refers to retirement of a Government servant on his attaining the age of superannuation. The appellant's case is not one of retirement from service on his attaining the age of superannuation. No order asking the appellant to continue in service before he had attained the age of superannuation for the purpose of concluding a departmental inquiry instituted against him had also been passed by the competent authority. On the other hand the appellant had been permitted to retire from service on invalid pension on medical grounds even before he had attained the age of superannuation. Rule 73(f) of the Bihar Service Code is clearly inapplicable to the case of the appellant. Further at the time the order of retirement on medical grounds was passed the Excise Commissioner had also before him the medical certificate of the Civil Surgeon. At that stage two courses were open to the Excise Commissioner. He could have either dimissed the appellant if he felt that the charges had been established or he could have ordered his retirement on invalid pension under rule 116 of the Bihar Pension Rules. The Excise Commissioner, however, passed an order directing the retirement of the appellant on January 31, 1962 with effect from July 19, 1961. Thus the appellant ceased to be a Government employee. Any order of dismissal passed thereafter would be unsustainable unless it was permissible under law to the State Government to revoke the order of retirement and to reinstate him in his former status as Government servant before the order of dismissal was passed. [234B-E; 233F-G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 683 of 1971

From the Judgment and Order dated 3.4.1969 of the Patna High Court in Civil Writ Jurisdiction Case No. 444 of 1967.

B.P. Singh for the Appellant.

D. Goburdahn for the Respondents.

The Judgment of the Court was delivered by

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A **VENKATARAMIAH, J.** This appeal by certificate is filed against the judgment of the High Court of Patna in Civil Writ Jurisdiction Case No. 444 of 1967 delivered on April 3, 1969.

The appellant was employed as a Clerk in the Excise Department of the State of Bihar at Hazaribagh. In a disciplinary proceeding instituted against him, 17 charges were framed against him. During the enquiry he had been kept under suspension. The Inquiring Officer however found only six of them established and accordingly a report was submitted by him on November 9, 1960. On the 8th of September, 1961 the appellant was asked by the Excise Commissioner, who was the Disciplinary Authority, to show cause why he should not be removed from service. The appellant submitted his reply to the said notice on November 1, 1961 showing cause against the proposed action. After the submission of the report by the Inquiring Officer the civil surgeon of the area issued a certificate to the effect that the appellant was an invalid and he could not discharge his duties properly in that state of health. On January 31, 1962 an order was passed by the Excise Commissioner directing the retirement of the appellant on invalid pension under rule 116 of the Bihar Pension Rules with effect from July 19, 1961. Thus he ceased to be a Government employee. Nearly one year and nine months after the date of retirement of the appellant on October 5, 1963 the Government of Bihar revoked the order of retirement and the relevant part of its communication reads thus:

> "I am to invite a reference to this department memo No. 869 dated 31-1-62 with which the order of the Excise Commissioner was conveyed to you allowing Excise Clerk, Shri Kirti Bhusan Singh (Under suspension) to retire on invalid pension with effect from 19-7-61 under rule 116 of Bihar Pensions Rules."
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> "The said order has been re-examined by Govt. in the light of Rule 73(f) of the Bihar Service Code, and it has been found that since departmental proceedings were pending against the Excise Clerk it was irregular to permit him to retire on invalid pension. Govt. have, therefore, decided to revoke the order of the Excise Commr. contained in his memo No. 869 dated 31-1-62. As a result the Excise Clerk should be deemed to be continuing under suspension and that he would be entitled to subsistence

> allowances as may be admissible to him under the Rules till final orders are passed on the proceedings which were pending against him at the time the said memo was issued."

Thereafter the Excise Commissioner passed an order on November 1, 1963 dismissing the appellant from service. The appellant questioned the order of dismissal in the Writ Petition before the High Court out of which this appeal arises.

In the High Court the appellant contended that after he had been retired from service by the order dated January 31, 1962 with effect from July 19, 1961 it was not permissible to the State Government to revoke the order of retirement by its order dated October 5, 1963 and to the Excise Commissioner to pass an order of dismissal from service thereafter on November 1, 1963. On behalf of the State Government it was contended that it was open to the State Government under rule 73(f) of the Bihar Service Code to revoke the order of the Excise Commissioner retiring the appellant on invalid pension and therefore the order of dismissal passed subsequently was a valid order. The High Court accepting the contention urged on behalf of the State Government dismissed the Writ Petition.

In this appeal the appellant has questioned the correctness of the judgment of the High Court. In this case the facts are not in dispute. By January 31, 1962 the reply to the show cause notice had already been submitted by the appellant. The Excise Commissioner had also before him the medical certificate of the Civil Surgeon. At that stage two courses were open to the Excise Commissioner. He could have either dismissed the appellant if he felt that the charges had been established or he could have ordered his retirement on invalid pension under rule 116 of the Bihar Pension Rules. The Excise Commissioner, however, passed an order directing the retirement of the appellant on January 31, 1962 with effect from July 19, 1961. Thus the appellant ceased to be a Government employee. Any order of dismissal passed thereafter would be unsustainable unless it was permissible under law to the State Government to revoke the order of retirement and to reinstate him in his former status as Government servant before the order of dismissal was passed. Rule 73(f) of the Bihar Service Code on which reliance is placed by the State Government reads thus:

> "Notwithstanding anything contained in foregoing clauses, a Government servant under suspension on a charge of

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misconduct, shall not be required or permitted to retire on reaching the date of compulsory retirement but shall be retained in service until the enquiry into the charge is concluded and a final order is passed thereon by the competent authority."

The expression 'compulsory retirement' found in rule 73(f) of the Bihar Service Code refers to retirement of a Government servant on his attaining the age of superannuation. This is not a case in which the appellant had been permitted to retire from service on the ground that he had attained the age of superannuation. No order asking the appellant to continue in service before he had attained the age of superannuation for the purpose of concluding a departmental inquiry instituted against him had also been passed by the competent authority. On the other hand the appellant had been permitted to retire from service on invalid pension on medical grounds even before he had attained the age of superannuation. Rule 73(f) of the Bihar Service Code is clearly inapplicable to the case of the appellant. No other provision which enabled the State Government or the competent authority to revoke an order of retirement on invalid pension is brought to our notice. The order of retirement on medical grounds having thus become effective and final it was not open to the competent authority to proceed with the disciplinary proceedings and to pass an order of punishment. We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement on medical grounds which had become effective and final, the order dated October 5, 1963 passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity.

We, therefore, allow this appeal, set aside the judgment of the High Court and quash the order of the State Government dated October 5, 1963 revoking the order of retirement of the appellant and the order of dismissal dated November 1, 1963 passed by the Excise Commissioner.

We are informed by the learned counsel for the appellant that the appellant had died on December 28, 1984 during the pendency of this appeal. We, therefore, direct the State Government to pay to the

legal representatives of the appellant all the arrears of pension due to the appellant from November 1, 1963 up to the date of his death. The State Government shall also pay the costs of this appeal to the legal representatives of the appellant.

S.R. Appeal allowed.