(2012) 05 PAT CK 0115

Patna High Court

Case No: CWJC No. 8196 of 2003

Subrata Basu	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision: May 15, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 226, 309, 311(2)
- Criminal Procedure Code, 1973 (CrPC) - Section 389
- Penal Code, 1860 (IPC) - Section 201, 302, 304B, 34, 498A
- Prevention of Corruption Act, 1988 - Section 5(1)

Citation: (2013) 3 PLJR 608

Hon'ble Judges: Mihir Kr. Jha, J

Bench: Single Bench

Advocate: Ravi Shankar Ganguli, for the Appellant; Maruth Nath Roy, for the Respondent

Final Decision: Dismissed

Judgement

Mihir Kr. Jha, J.

Heard Mr. Ravi Shankar Ganguli, learned counsel for the petitioner and Mr. Maruth Nath Roy, AC to SC-25 for the State. In this writ application, the petitioner has prayed for quashing an order dated 25.6.2003 as contained in Annexure-1 passed by the Chief Secretary of the Government of Bihar directing the appeal of the petitioner against the order of dismissal from service dated 16.11.2001 passed on his conviction and sentence for life in criminal case for offence under Sections 304-B, 498-A and 201 of the Indian Penal Code (in short I.P.C.) pending till disposal of his criminal appeal No. 523 of 2000 filed by him in this court against the judgment of the aforesaid conviction and sentence. The petitioner, by way of a consequential relief, has also sought a direction for commanding the Chief Secretary off the State of Bihar to allow his pending service appeal by setting aside the order of his punishment of dismissal from service dated 16.11.2001 (Annexure-2).

2. The facts giving rise to this writ application lie in a very narrow compass. The petitioner, while working as an Assistant in the Department of Cabinet Secretariat and Coordination Department, was made accused in a criminal case being Gardanibagh P.S. Case No. 564 of 1998 dated 17.9.1998 for offence under Sections 498-A/ 304-B/ 201 I.P.C. The petitioner was immediately taken into custody on 18.9.1998 and was also placed under suspension by an order dated 5.11.1998 in terms of Rule 3A(c) of the Bihar & Orissa Subordinate Services (Discipline and Appeal) Rules, 1935 (hereinafter to be referred to as "the 1935 Rules") which authorizes the appointing authority to place an employee governed by the Rules under suspension in respect of criminal offence u/s 304-B I.P.C. which is under investigation, enquiry or trial. In the trial which was undertaken immediately, the Sessions Court in Sessions Trial No. 1439 of 1998 by its judgment dated 28.9.2000 had held the petitioner guilty for offence under Sections 498-A, 304-B and 201 of the I.P.C. and had also sentenced him to undergo rigorous imprisonment for life for offence u/s 304-B I.P.C. in addition to separate sentences of three years each rigorous imprisonment for offence under Sections 498-A and 201 I.P.C. respectively. The petitioner, who as noted above, was taken into custody since 5.11.1998 soon after recording of F.I.R. and was in jail throughout the trial, however, was released on bail on 12.1.2001 in view of the order of this Court passed in the Criminal Appeal No. 523 of 2000.

3. The further case of the petitioner is that on 16.11.2001, in view of his being convicted and sentenced for life, was dismissed from service by the order of the competent appointing authority dated 16.11.2001. The petitioner thereafter had preferred an appeal on 3.9.2002 before the Chief Secretary being appellate authority in terms of Rule 8 of the Rules, which has been dealt and decided by the impugned order dated 25.6.2003 gist whereof is such appeal of the petitioner shall be kept pending till disposal of his Criminal Appeal No. 523 of 2000 pending before this Court.

4. In this case, initially a counter affidavit was filed by the respondents justifying the order of punishment of the dismissal of the petitioner on the ground that since the petitioner had been convicted for life in the aforementioned criminal case, he, in terms of proviso to Article 311(2)(a) of the Constitution of India, had been dismissed from service by an order dated 16.11.2001 and the appellate authority, in view of the pendency of the criminal appeal of the petitioner before this Court, had thought it prudent to await the decision of the criminal appeal, inasmuch as, the dismissal of the petitioner from service was based on the conviction and sentence in the Criminal Case. In the said counter affidavit, it has also been stated that the petitioner''s initial appointment also was found to be bad and in view of the direction given by this Court in LPA No. 1511 of 1995, his appointment as a Bill Clerk and consequently any other appointment earned by him on the basis of his being Bill Clerk had been cancelled and as such, the petitioner could not be even otherwise reinstated in service till his order of termination of service dated 13.5.2002 was revoked by the

competent authority/court. The respondents in defence of their action and the impugned order had also relied on a order of the learned single Judge dated 7.8.2000 in CWJC No. 7136 of 2000 (Shafiqur Rahman vs. State of Bihar & Ors.) wherein it was held that whenever Shafiqur Rahman convicted in a criminal case would be acquitted from his charge in his pending Criminal Appeal, he will have the liberty to move the authority for recall of his order of dismissal dated 25.4.2000.

5. At the outset, it has to be kept in mind that the relief of the petitioner of his being retained in service despite his being a convict for life in a criminal case was based on the ground of a stipulation made in paragraph No. 9 of the Government Circular dated 23.8.1963 as contained in Annexure-6 to the writ application, which for the sake of clarity is quoted hereinbelow:--

Memo. No. III/R1-102/63-A-10158

GOVERNMENT OF BIHAR
APPOINTMENT DEPARTMENT

To

ALL DEPARTMENTS OF GOVERNMENT
ALL HEADS OF DEPARTMENTS
Patna, the 23rd August, 1963

Subject.- Government servants involved in criminal misconduct--Departmental proceedings and prosecutions.

The undersigned is directed to say that Government have decided, is suppression of all previous orders on the point, that the following procedure should be adopted in dealing with Government servants involved in criminal misconduct:--

(1) As soon as sufficient evidence is available, in course of departmental investigation, etc., of criminal misconduct on the part of any Government servant, disciplinary action should be initiated forthwith and disposed of according to the rules.

(2) In suitable cases criminal proceedings should be instituted simultaneously. Where the conduct of a Government servant discloses some grave offence, criminal prosecution must be the rule and not the exception. If a prima facie case has been made out, prosecution should not be avoided merely on the ground that the case might end in acquittal.

(3) Government have noticed that a number of departmental proceedings have been kept pending for long periods because the person concerned was being prosecuted before a criminal court. It is necessary to check this tendency. It is by no means necessary that the final order in departmental proceedings must await disposal of the same or connected issues by a Court of Law. In The Delhi Cloth and General Mills Ltd. Vs. Kushal Bhan, the Supreme Court observed:--"It is true that very

often employees stay enquiries into the misconduct of the employees pending the decision of the criminal trial courts dealing with the same facts and that is fair but we cannot say that principles of natural justice require that an employer must wait for the decision, at least of the criminal trial court, before taking action against an employee." This was followed in Jhulan Singh Vs. D.C. Ghatak and Another,

(4) Government are advised that (even apart from cases under the Public Servants Enquiries Act) there is no contempt if departmental proceedings are carried and finally decided under the Civil Services (Classification, Control and Appeal) Rules, the Bihar and Orissa Subordinate Services (Discipline and Appeal) Rules. All India Services (Discipline and Appeal) Rules, 1955, Rule 828 of the Police Manual and other statutory rules, while police investigation, enquiry trial is in progress in respect of the same or allied subject matter.

(5) It would be desirable to hold the departmental proceedings in camera when the Government servant concerned is also being prosecuted in a court of law on similar charges.

(6) Only if the criminal case against the Government servant is of a grave and complicated nature would it be advisable to await the conclusion of the criminal case before disposing of the departmental proceedings.

(7) If the criminal court acquits the accused Government servant who has earlier been punished in departmental proceeding, the appointing authority must immediately review the case. Two considerations will be relevant. First departmental and legal proceedings, may not have covered the same ground, so that the courts findings may leave untouched the decisions arrived at in the departmental proceedings. Second, while the court may have held that there was no offence, the appointing authority may decide that the accused Government servant was guilty of departmental misdemeanour and has not behaved in a manner expected of him as a Government servant. In such circumstances a Government servant held not guilty by the Court may still be dismissed from service.

(8) On the other hand the review may disclose that the trial has brought out facts and circumstances in the light of which the decision taken earlier in departmental proceedings ought to be reversed.

(9) Under proviso (a) to Article 311(2) of the Constitution a Government servant may be dismissed or removed or reduced in rank without being put through departmental proceedings on the ground of conduct which has led to his conviction on a criminal charge. Government desire that this proviso should be fully utilized. But an appeal being in continuation of the trial, action under this proviso should not be taken until (1) the criminal appeal has been disposed of, or (2) the time limit for filing an appeal has expired.

S.J. Majumdar,
Chief Secretary to Government.

(Underlining for emphasis)

6. As a matter of fact, when this case was taken up for hearing in the admission, this Court having noted the aforementioned underlined portion of Government Circular dated 23.8.1963 had passed the following order on 2.9.2003:--

The petitioner a life convict for offence punishable u/s 498-A read with Section 304-B I.P.C. was terminated by order No. 5023/98 of 16th November, 2001. The petitioner seeks to challenge the said order of termination placing his extra strong reliance on a departmental circular dated 23rd August, 1963 contained in Memo No. III/R1-102/63-A-10158 (Annexure-6) submitting that the Chief Secretary to the Government has issued the instructions that on submission of the appeal and the same being continuance of the trial, action under proviso (a) to Article 311(2) of the Constitution of India should not be taken until the criminal appeal has been finally disposed of or the time limit for filing an appeal has expired. Learned counsel for the petitioner has also placed strong reliance on a single Bench judgment of this Court reported in 1995(1) PLJR 399 and a Division Bench judgment of this Court reported in Radha Shayam Pathak Vs. The State of Bihar and Others, True it is that these two judgments support the submissions made by the petitioner.

I am shocked and surprised to see such a circular issued by the State Government and obliged to say that it is really shameful on the part of the Government to protect the convicts in a manner like this. A life convict or even otherwise a convict, who has been so found by a court of competent jurisdiction on one hand shall remain under suspension and at the same time under a circular cannot be removed from services. Is the State Government protecting the criminals and convicts and is allowing them to continue in the Government services?

Let the respondents file their additional counter showing that why the order contained in Annexure-2 be not quashed in light of the said circular. Let the Chief Secretary and the Law Secretary also file their personal counter in to Annexure-6.

7. Pursuant to the observations made above, the respondents had filed a supplementary counter affidavit annexing the copy of a Government decision dated 28.10.2003 modifying the earlier circular dated 23.8.1963, which also being is quoted hereinbelow:--

But an appeal being continuation of the trial, action under this proviso should not be taken until (1) the criminal appeal has been disposed of or (2) the time limit for filing an appeal has expired.

8. This writ application, thereafter, while it had remained pending, the petitioner had filed MJC No. 305 of 2004 for modification/recall of the observations made in the order dated 2.9.2003, whereafter, this Court had passed the following order on

18.3.2004:--

This M.J.C. application has been filed for recall of certain observations made by this Court in its order dated 2.9.2003 passed in C.W.J.C. No. 8196 of 2003. It is to be noted that a strong reliance was placed by the said petitioner upon the memo dated 23rd August, 1963 to submit that if a particular person has been convicted and he prefers an appeal then a departmental action should not be taken against him. This Court required the State Government to look into the matter and also made certain observations that was the State trying to protect the criminals and convicts. The Chief Secretary of the State has filed an affidavit in the said C.W.J.C. and has submitted that their earlier circular has been suitably modified and amended. The question of amendment of the said circular shall be taken care of and its effect would also be considered in the said C.W.J.C. No. 8196 of 2003. The present petition for modification can be disposed of simply observing that if the State Government has modified its earlier circular, then it is acting honest and is acting in accordance with the judgment of the Supreme Court.

With these observations, the M.J.C. application is disposed of.

9. Mr. Ganguli, in support of the relief prayed in this writ application and specially in view of the observations made in the order dated 18.3.2004 in MJC No. 305 of 2004, has filed a rejoinder petition on 3.5.2012, wherein, he has explained that the order of termination of the petitioner on the post of Bill Clerk in the cases of other similarly situated persons has been set aside by this Court in the order dated 2.9.2002 in CWJC No. 6628 of 2002 as also the order dated 24.9.2002 in CWJC No. 6959 of 2002, CWJC No. 7182 of 2002, CWJC No. 7324 of 2002, CWJC No. 8046 of 2002 and CWJC No. 9770 of 2002 and as such, the petitioner''s cancellation of initial appointment on the post of Bill Clerk will have no meaning in the eye of law specially when such an order was passed after the order of dismissal of the petitioner dated 16.11.2001.

10. Mr. Ganguli has further submitted that the decision of the Chief Secretary of the Government of Bihar by passing the impugned order, whereby and whereunder, the appeal of the petitioner has been kept pending till disposal of the criminal appeal, would literally amount to abdication of his power as an appellate authority.

11. He has also submitted that the Government Circular dated 23.8.1963 being applicable on the date on which the petitioner''s order of dismissal dated 16.11.2001 had been passed, the Chief Secretary of Bihar, in all fairness, ought to have allowed the appeal instead of keeping it pending. He has also assailed the subsequent Government Circular dated 28.10.2003 by taking a plea that the beneficial provision of the circular dated 23.8.1963 was in keeping with the spirit of the settled law that till the appeal being in continuation of the case, was disposed of, a convicted person by the trial court could have been conclusively held to be guilty so as to be handed out the order of dismissal from service on the ground of his being convicted

employee.

12. He has also submitted that in any event, the said circular dated 28.10.2003, removing the beneficial provision of retaining the convicted Government servant in service till disposal of appeal by the earlier circular dated 23.8.1963, can be given only a prospective operation and as such, at least the said modified circular dated 28.10.2003 cannot be made applicable in the case of the petitioner and his case has to be governed by the earlier circular dated 23.8.1963. In this regard, reliance has also been placed by him on the judgment of the Apex Court in the case of AIR 1997 3127 (SC)

13. Learned counsel for the petitioner in fact has also gone to assail the modified circular dated 28.10.2003 by taking a plea that if a suspended Government servant, due to pendency of criminal case, is entitled to the benefit of subsistence allowance, the same cannot be suddenly snatched on account of his being convicted and then removed from service as that would amount to leaving the Government servant, facing prosecution in a criminal case in the state of penury. In order to support himself on this aspect, he has relied on certain observations made by the Apex Court in the case of State of Maharashtra Vs. Chandrabhan Tale,

14. Mr. Ganguli has also submitted that as with regard to the State of Bihar, there being a special provision by way of the circular dated 23.8.1963, its amendment/modification by the subsequent Government circular dated 28.10.2003 on the basis of the judgment of the Apex Court in the case of Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, is itself bad, inasmuch as, in the aforementioned case, the Supreme Court had no occasion to consider the same circular dated 23.8.1963 as prevailing and applicable for the employees of the State of Bihar.

15. Having thus made his attack on the modified circular, Mr. Ganguli has also submitted that since the benefit of earlier circular dated 23.8.1963 had been given to a large number of convicted Government servant by allowing them to continue in service till pendency of their appeal, no discrimination should be made in the case of the petitioner and to that extent, he has relied on the judgment of Radha Shayam Pathak Vs. The State of Bihar and Others, as also in the case of Ram Nandan Prasad vs. State of Bihar & Ors. reported in 1995 (1) PLJR 399.

16. He has also made it clear that if need be, the petitioner can move an application u/s 389 of the Cr.P.C. seeking stay of the operation of the impugned judgment of conviction and sentence but in no event, his dismissal should be allowed to continue specially when the Criminal Appeal No. 523 of 2000 would take a long period in its being disposed of in view of the fact that at present in the Division Bench, criminal appeal cases of the year 1989-90 are being decided by this Court.

17. Per contra, learned counsel for the respondents has submitted that the facts being admitted that the petitioner is a convicted accused for life for offence under

Sections 304B, 498A and 201 of the IPC, there would be no difficulty in coming to the conclusion that the impugned order of his dismissal from service is in conformity with the provisions made under proviso (a) to Article 311(2) of the Constitution of India.

18. He has also submitted that the circular dated 23.8.1963, being in the form of executive instruction, cannot be enforced by the petitioner by way of a writ application specially when the relied portion by the counsel for the petitioner, namely, paragraph No. 9 thereof was itself in teeth of the observations and taw laid down by the Supreme Court in the case of The State of Uttar Pradesh Vs. Mohammad Nooh,

19. He has also submitted that modification of such circular based on the observations made by this Court in the order dated 2.9.2003 doing away altogether with the provisions of awaiting the result of appeal before dismissing the convicted employee in fact is in the light of the law laid down by the Apex Court in several cases that once a Government servant is convicted, there would be no need to wait the result of appeal. In this context, he had placed reliance on a judgment of the Apex Court in the case of Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, in the case of Municipal Committee, Bahadurgarh Vs. Krishan Behari and others, in the case of Union of India and others Vs. Ramesh Kum, as also the judgment of this Court dated 7.8.2001 in CWJC No. 7136 of 2000 (Shafiqur Rahman vs. State of Bihar & Ors.) and in the case of Laxmi @ Lakshmi Sahani Vs. The Union of India and Others,

20. As with regard to appellate order passed by the Chief Secretary, he has submitted that Rules 4 to 9 of the 1935 Rules by which the petitioner was governed, itself vest power to the appellate authority to pass any order which in the facts and circumstances of that case would be appropriate and, therefore, once in his case, the Chief Secretary had found the petitioner to be a life convict in respect of an allegation which was also affecting the moral turpitude of the petitioner, he was not bound to reinstate the petitioner back in service by setting aside the order of his dismissal from service and as such, his decision to keep the appeal pending tin disposal of criminal appeal filed by him against the judgment of his conviction and sentence cannot be faulted with either on fact or in law.

21. On the basis of the materials on record and the aforesaid submissions of learned counsel for the parties, the first and the foremost question would be whether the order of dismissal of service of the petitioner based on his conviction in criminal case is bad because the respondents did not await the decision of the criminal appeal in disregard to their own circular dated 23.8.1963. Such question in fact would involve two aspects, namely, the justification of the petitioner being dismissed from service after the judgment of his conviction and sentence and the petitioner availing the remedy of appeal. As noted above, the petitioner was placed under suspension immediately after taking into custody in a criminal case pending

his trial. Such suspension was in terms of Rule 3A of the 1935 Rules, which reads as follows:--

3A. (1) The appointing authority or any authority to which it is subordinate or the Governor, by general or special order, may place a Government servant under suspension--

(a) where a disciplinary proceeding against him is contemplated or is pending; or

(b) where a case against him in respect of any criminal offence is under investigation, injury or trial.

(2) A Government servant shall be deemed to have been placed under suspension by an order of appointing authority--

(a) with effect from the date of his detention, if he is detained in custody whether on a criminal charge or otherwise, for a period exceeding forty-eight hours.

(b) with effect from the date of his conviction, if in the event of a conviction for an offence, he is sentenced to a term of imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed or compulsorily retired consequent to such conviction.

Explanation.---The period of forty-eight hours referred to in clause (b) of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.

(3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.

(4) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a court of law and the disciplinary authority on a consideration of the circumstances of the case, decide to hold a further inquiry against him on the allegation on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the appointing authority from the date of the original order of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders.

(5)(a) An order of suspension made or deemed to have been made under this rule shall continue to remain in force until it is modified or revoked by the authority competent to do so.

(b) Where a Government servant is suspended or is deemed to have been suspended (whether in connection with any disciplinary proceeding or otherwise), and any other disciplinary proceeding is commenced against him during the continuance of that suspension the authority competent to place him under suspension may for reasons to be recorded by him writing, direct that the Government servant shall continue to be under suspension until the termination of all or any of such proceedings.

(c) An order of suspension made or deemed to have been made under this rule may at any time be modified or revoked by the authority which made or is deemed to have made the order or by any authority to which that authority is subordinate.

(Underlining for emphasis)

22. As would be noted from perusal of the aforementioned Rules, the amendment in Rule 3(A) by inserting the underlined provision was made by GSR 12 dated 8.8.1990 enabling the competent authority to place a Government servant under suspension on the ground of his facing prosecution for offence u/s 304B of the Indian Penal Code. Such order of suspension in terms of Rule 3(A)(5) was to remain in force until it was modified or revoked by the competent authority to do so. The order of suspension of the petitioner was passed only during the pendency of his facing criminal trial for offence u/s 304-B I.P.C. and, therefore, the life of such suspension order had come to an end when the judgment in the criminal case convicting him for offence u/s 304-B I.P.C. and sentencing him to under rigorous imprisonment for life had been passed. In that view of the matter, the respondents were under obligation to consider the case of the petitioner and the competent authority having found the petitioner to have been convicted for offence u/s 304-B I.P.C. and other allied offences had dismissed him from service by an order dated 16.11.2001 in keeping with the requirement of proviso A to Article 311(2) of the Constitution of India laying down automatic dismissal, removal or reduction in rank after conviction of a Government servant. Thus, the recourse taken to by the respondents in passing such an order on 16.11.2001 dismissing the petitioner on account of his being convicted by the competent court cannot be faulted either on fact or in law, inasmuch as, in the facts and circumstances of this case, the petitioner, a life convict for an offence u/s 304-B IPC, could not have been allowed to continue in service.

23. There would be no difficulty in also holding that a Government servant in terms of Rule 3 of the Bihar Government Service Conduct Rules is required to maintain absolute integrity, devotion to duty and to do nothing which is unbecoming of a Government servant. It was this aspect of the matter which was considered by the Full Bench of this Court in the case of Sarju Prasad Singh Vs. State of Bihar and Others, wherein, it was held that a Government servant having been convicted by a court of competent jurisdiction for criminal charge of murder can be said to have committed for an offence involving moral turpitude and thus his such conduct being in violation of Rule 3 of the Bihar Government Service Conduct Rules. Learned

counsel for the petitioner, however, had submitted that an act done by the Government servant in his private capacity and not involving discharge of his official duty would not amount to an act of moral turpitude. This Court, however, is not in agreement with the aforementioned submissions, inasmuch as, a Government servant must observe one standard of rectitude, honesty and integrity for purposes of both his official and non-official life as was held in the case of Daya Shankar Vs. High Court of Allahabad and Others through Registrar and Others, where a Government servant having been caught using unfair means in examination, an act which did not relate to his discharge of official duties, was held to be conduct to totally unworthy of the office of a Government officer. The issue relating to moral turpitude has been also decided by the Apex Court in relation to a Government servant in the case of Pawan Kumar Vs. State of Haryana and another, as also in the case of Allahabad Bank and Another Vs. Deepak Kumar Bhola, wherein it was held as follows:--

25. In view of the above, it is evident that moral turpitude means anything contrary to honesty, modesty or good morals. It means vileness and depravity. In fact, the conviction of a person in a crime involving moral turpitude impeaches his credibility as he has been found to have indulged in shameful, wicked and base activities.

24. Thus in view of the aforementioned provisions of the relevant 1935 Rules and law laid down by the Apex Court and this Court, as referred above, the petitioner involved in a criminal case with direct allegation relating to his moral turpitude was placed under suspension pending trial and therefore when he had also stood convicted for the offence u/s 304B I.P.C. and sentenced to R.I. for life, it cannot be claimed by him that he had to be still retained in service only on the ground of there being a circular of the State Government dated 23.8.1963.

25. That would bring this Court to other aspect as with regard to the nature and scope of the circular of the State Government dated 23.8.1963. As noted above, the said circular already quoted in extenso, was more in the form of instruction to the competent appointing authorities to deal with a Government employee facing charge in a criminal case. That is how, paragraph Nos. 1 to 8 of the said circular provides the ways and means to deal with such person. Paragraph No. 9 thereof in fact again is only by way of instruction and whatever has been said therein has to be also understood in the context that the normal rule will be that a Government servant on being convicted by a court in a criminal case would be liable to be dismissed, removed or reduced in rank but, an appeal, being in continuation to the trial, action under this proviso i.e. proviso (a) to the Article 311(2), should not be taken until the criminal appeal stands disposed of or the time limit for filing such appeal has expired. The said circular however runs contrary to the law laid down by the Apex Court in the case of Mohammad Noon (supra) wherein it was held as follows:--

--------There is nothing in the Indian Law to warrant the suggestion that the decree or order of the Court or tribunal of the first instance becomes final only on the termination of all proceedings by way of appeal or revision.....

26. In the light of the aforementioned law laid down by the Apex Court in the case of Mohammad Noon (supra), it would be clear that the view taken in the circular of the State Government of the appeal being in continuation of appeal in paragraph No. 9 of the circular dated 23.8.1963 was itself Vulnerable if not bad. It is this aspect of the matter which has been subsequently considered by the Apex Court in large number of cases including in the case of S. Nagoor Meera (supra) wherein it was also held as follows:--

9. The Tribunal seems to be of the opinion that until the appeal against the conviction is disposed of, action under clause (a) of the second proviso to Article 311(2) is not permissible. We see no basis or justification for the said view. The more appropriate course in all such cases is to take action under clause (a) of the second proviso to Article 311(2) once a Government servant is convicted of a criminal charge and not to wait for the appeal or revision, as the case may be. If, however, the Government servant-accused is acquitted on appeal or other proceeding, the order can always be revised and if the Government servant is reinstate, he will be entitled to all the benefits to which he would have been entitled to had he continued in service. The other course suggested, viz., to wait till the appeal, revision and other remedies are over, would not be advisable since it would mean continuing in service a person who has been convicted of a serious offence by a criminal court. It should be remembered that the action under clause (a) of the second proviso to Article 311(2) will be taken only where the conduct which has led to his conviction is such that it deserves any of the three major punishments mentioned in Article 311(2).

27. The same view was again reiterated by the Apex Court in the case of State of T.N. v. K. Guruswamy, (1996) 7 SCC 114) wherein dismissal from service on the ground of conviction for offence u/s 5(1) of the Prevention of Corruption Act was held to be correct requiring no show-cause notice after the judgment of conviction. In fact the Apex Court in the case of Union of India and others Vs. Ramesh Kum, had upheld the order of dismissal from service of a convicted employee by observing as follows:--

7. A bare reading of Rule 19 shows that the Disciplinary Authority is empowered to take action against a Govt. servant on the ground of misconduct which has led to his conviction on a criminal charge. The rules, however, do not provide that on suspension of execution of sentence by the Appellate Court the order of dismissal based on conviction stands obliterated and dismissed Govt. servant has to be treated under suspension till disposal of appeal by the appellate Court. The rules also do not provide the Disciplinary Authority to await disposal of the appeal by the Appellate Court filed by a Govt. servant for taking action against him on the ground of misconduct which has led to his conviction by a competent Court of law. Having

regard to the provisions of the Rules, the order dismissing the respondent from service on the ground of misconduct leading to his conviction by a competent Court of law has not lost its string merely because a criminal appeal was filed by the respondent against his conviction and the Appellate Court has suspended the execution of sentence and enlarged the respondent on bail. This matter may be examined from another angle. u/s 389 of the Code of Criminal Procedure, the appellate Court has power to suspend the execution of sentence and to release an accused on bail. When the appellate Court suspends the execution of sentence, and grants bail to an accused the effect of the order is that sentence based on conviction is for the time being postponed, or kept in abeyance during the pendency of the appeal. In other words, by suspension of execution of sentence u/s 389 Cr.P.C. an accused avoids undergoing sentence pending criminal appeal. However, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a Govt. servant on a misconduct which led to his conviction by the Court of law does not lose its efficacy merely because Appellate Court has suspended the execution of sentence. Such being the position of law, the Administrative Tribunal fell in error in holding that by suspension of execution of sentence by the appellate Court, the order of dismissal passed against the respondent was liable to be quashed and the respondent is to be treated under suspension till the disposal of Criminal Appeal by the High Court.

28. The same position was also explained by the Apex Court in a recent judgment in the case of Union of India (UOI) Vs. V.K. Bhaskar, and further reiterated in the recent judgment of Sushil Kumar Singhal Vs. The Regional Manager, Punjab National Bank, wherein it was held that in case an employee who stands convicted for an offence of moral turpitude it is his such misconduct that would lead to his dismissal.

29. Thus in the light of the aforementioned discussions and the law settled on the issue, this Court must hold that neither the order of dismissal from service of the petitioner dated 16.11.2001 nor the pendency of the appeal could have stood in the way of the authorities in dismissing the petitioner from service.

30. As noted above, the said circular dated 23.8.1963 at best being an executive instruction could not be even otherwise made applicable to the petitioner after the same was found to be bad by this Court in this very case and had led to issuance of the modified circular dated 28.10.2003. In this regard, law is well settled that no writ of mandamus can be issued to enforce an executive instruction specially when it is contrary to law laid down by the Apex Court.

31. An ancillary question would also be whether the amendment of the circular dated 23.8.1963 by the subsequent circular dated 28.10.2003 was itself bad or in any event could not be given retrospective operation in respect of such cases in which conviction by the court and the resultant appeal arising therefrom are pending as on 23.10.2003. As noted above, the circular dated 23.8.1963 was itself in teeth of the observation and the law laid down in the case of Mohammad Nooh (supra) and,

therefore, if the same was modified by the subsequent circular dated 28.10.2003, that cannot be held to be bad. In any event, this Court-while exercising its power is not expected to perpetuate illegality by protecting a convicted Government servant which would run counter to the mandate under proviso (a) Article 311(2) of the Constitution of India which envisages automatic dismissal from service of a convicted employee even without underlying normal departmental proceeding.

32. At this stage, one more submission of the learned counsel for the petitioner must be taken into account that if a convicted employee is continued in service till pendency of the appeal, he would get subsistence allowance and/or payment of salary which would enable him to survive and contest the appeal. For this purpose, he has also relied on certain observations made by the Apex Court in the case of Chandrabhan (supra) wherein it was held that fixation of one rupee as a subsistence allowance for a convicted employee was a misnomer and was in teeth of the constitutional right guaranteed under Articles 14 and 16 of the Constitution of India.

33. In the considered opinion of this Court, the judgment of Apex Court in the case of Chandrabhan (supra) cannot be made applicable to the Bihar circular for two reasons, inasmuch as, in the Rules governing the service condition of the petitioner, there is a specific provision for payment of subsistence allowance only during the period of suspension. Such suspension in terms of the Rules is permissible only during the pendency of the enquiry, investigation or trial of a criminal case and in fact, when the trial has already concluded, there is nothing in the service rules to show that even a convicted employee has to be placed under suspension. Suspension of an employee pending criminal case therefore comes to an end after the conviction of the employee in the criminal case leading to his dismissal from service in terms of proviso (a) to Article 311(2) of the Constitution of India. Thus there can be no question of payment of any amount of subsistence allowance to such a convicted employee. In fact, it was this aspect of the matter which was also noticed by the Apex Court in the case of Ramesh Kumar (supra) wherein the judgment in the case of Chandrabhan (supra) was not only dealt with but also distinguished in the following terms:--

8. Before we part with this case, we would like to refer the decision of this Court in the case of State of Maharashtra Vs. Chandrabhan Tale, and two administrative orders heavily relied upon by the Administrative Tribunal in allowing the application of the respondent. In the case of Chandrabhan (supra) the validity of second proviso to Rule 151 of the Bombay Civil Service Rules which provided for payment of subsistence allowance at the rate of Re. 1 per month to a Govt. servant who is convicted by a competent Court of law and sentenced to imprisonment and whose appeal against the conviction and sentence is pending, was challenged and struck down by this Court. The question involved in the said case was entirely different than the question which was to be resolved by the Tribunal. We are, therefore, of the opinion that reliance of this decision of the Supreme Court was totally

misplaced. The Tribunal further relied upon two administrative orders passed by the Delhi Administration whereby two employees of the Delhi Administration were reinstated after the High Court suspended the execution of their sentences in appeals filed by them. Assuming that the facts of those cases and the present case are alike, reliance of such orders was totally misplaced for the reason being that those orders passed were not in conformity with law.

34. That would bring this Court to the yet another question as with regard to the exercise of power by the Chief Secretary in keeping the appeal of the petitioner pending. As noted above, Rules 4 to 9 of the Bihar & Orissa Subordinate Services (Discipline and Appeal) Rules, 1935 lays down the manner in which the appeal has to be filed and has to be decided. Rules 4 to 9 are accordingly quoted hereinbelow:--

4. Every member of a Subordinate Service (including temporary Government servants and officers on probation) shall be entitled to appeal to the authority immediately superior to the authority which passed an order--

(a) imposing upon him any of the penalties specified in Rule 2;

(b) terminating his appointment otherwise than on the expiry of the period of his appointment or on his reaching the age of superannuation.

5. No appeal as of right shall lie against an order declining to give an appointment or promotion except as a measure of punishment to a particular individual or affecting a transfer or an extension of service.

6. In the case of an appeal against an order imposing any penalty specified in Rule 2 the appellate authority shall consider--

(a) whether the facts on which the order was based have been established;

(b) whether the facts established afford sufficient ground for taking action; and

(c) whether the penalty is excessive, adequate or inadequate; and after such consideration shall pass such orders as it thinks proper.

7. The authority from whose order an appeal is preferred shall do so separately and in his own name.

8. Every Government servant preferring an appeal shall do so separately and in his own name.

9. Every appeal preferred under these rules shall contain all material statements and arguments relied on by the appellant shall contain no disrespectful or improper language and shall be complete in itself. Every such appeal shall be submitted through the Head of the office to which the appellant belongs or belonged and through the authority from whose order the appeal is preferred and shall be accompanied by a copy of the order appealed against.

(Underlining for emphasis)

35. Thus, from the reading of the aforementioned rules, it would be clear that the appellate authority in terms of Rule 6 underlined above, as against any of the penalty including dismissal from service is required to consider whether the case on which the order was based, has been established or whether the facts establishes the sufficient ground for taking action or whether the penalty is excessive and after such consideration shall pass such an order it thinks proper. Here in this case, the facts on which the order of dismissal from service was with regard to his being convicted in a criminal case and sentenced to life imprisonment after the competent trial court had already held the charges u/s 304B I.P.C. against the petitioner to have been proved and accordingly, when the said misconduct was itself covered by the relevant service rules namely Rule 3A(c) of 1935 Rule as discussed above, the decision of his dismissal from service being the permissible punishment, the same could not have been held to be excessive.

36. The only question, therefore, would be whether the order passed by the appellate authority to keep the appeal of the petitioner pending till disposal of his criminal appeal against the judgment of conviction and sentence of the petitioner was improper? This Court does not think so. As a matter of fact, by keeping the appeal of the petitioner pending, he has been given lease of life and if and when he is acquitted of his charge honorably by this Court in his pending criminal appeal, he can ask for review of such order as was held by the learned Single Judge of this Court in the case of Shafiqur Rahman (supra), which reads as follows:--

Heard the parties, the case is being disposed of at this stage. The petitioner, who was in the services of the State, was convicted in pursuance of a criminal case being Sessions Trial No. 663/96 under different sections including Section 302/ 34. In view of such conviction, the petitioner was dismissed from service vide order dated 25.4.2000 in the light of Article 311(2) of the Constitution.

The grievance of the petitioner is that the respondents without awaiting the decision in Criminal Appeal being Criminal Appeal No. 223/99, have issued the impugned order and they should have awaited the decision of the said appeal.

From the pleadings made by the petitioner and the enclosures attached thereto, as I find that the petitioner has already been convicted and matter pending for decision in criminal appeal, I am not inclined to interfere with the order of dismissal dated 25.4.2000.

If the petitioner is acquitted from the charges in criminal appeal aforesaid, may move the authorities for recall of order of dismissal dated 25.4.2000. In such case, if the petitioner is acquitted, the authorities will take step for recall of order and pass appropriate order taking into consideration the judgment as may be passed in the said appeal.

The writ petition stands disposed of, with the aforesaid observations/directions.

37. Thus, in the light of the discussions made above, the petitioner''s reinstatement in service till pendency of his criminal appeal as originally envisaged in the circular dated 23.8.1963, which now stands modified by the subsequent circular dated 28.10.2003 would not be permissible either on fact or in taw.

38. This Court, however, must take into account the submission of learned counsel for the petitioner as with regard to the retrospective operation of the said modified circular dated 28.10.2003, inasmuch, as, such submissions is based on his strong reliance placed on the judgment in the case of S.S. Bola (supra) which according to him has laid down (aw that rules relating to service conditions cannot be given retrospective operation. Learned counsel for the petitioner in this regard has however produced only the following truncated internet copy of the aforesaid judgment which as a whole is quoted hereinbelow:--

The power to frame rules to regulate the conditions of service under the proviso to Article 309 carries with it the power to amend or alter the rules with retrospective effect. However, it is well settled principle that the benefits acquired under the existing Rules cannot be taken away by an amendment with retrospective effect, that is to say, that there is no power to make such a rule under proviso to Article 309 which affects or impairs vested rights. It would, thus, be clear that a right has been vested in the direct recruits to have their seniority determined under the repealed Rules, as a result of the mandamus issued which became final, which still is available even after the Act has come into force with retrospective effect since the retrospective effect has already been held unconstitutional as saved by operation of Section 25 of repealing provisions. As a consequence, they are entitled to have their seniority determined accordingly.

39. From a close analysis of the aforesaid extracted portion of the judgment, it becomes clear that the truncated portion of the judgment produced by the learned counsel for the petitioner recorded in paragraph No. 151 is a minority view of the Apex Court, inasmuch as, the majority view has been recorded by the Apex Court in paragraph No. 161 and paragraph Nos. 213 & 215 wherein it was held that retrospective operation can be given to the Service Rules with effect from 1.11.1966 for the purpose of determining the inter se seniority of direct recruits and promotees in each of the services, namely, the PWD Branch, the Public Health Branch and the Irrigation Branch was intra vires. The minority view, therefore, recorded in paragraph No. 151 cannot be a authority that the circular dated 28.10.2003 would not govern the earlier cases in which conviction was already recorded and the Government servant had been dismissed from service.

40. Moreover, as noted above, the present case of the petitioner was pending before this Court and if during its pendency, this Court had found the earlier circular to be bad, whereafter the modified circular had been issued, today a writ of

mandamus cannot be issued for directing the Government to follow the earlier illegal circular, inasmuch as, it is well settled that this Court in exercise of power under Article 226 of the Constitution of India, cannot issue a direction to the Government to act contrary to the provisions of law. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of Manish Goel Vs. Rohini Goel, wherein after placing reliance on a large number of its earlier judgments on this issue, it had held as follows:--

No court has competence to issue a direction contrary to taw nor can the court direct an authority to act in contravention of the statutory provisions. The courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law.

41. Here in this case, when the Apex Court has consistently held that pendency of the appeal cannot be a ground to retain a convicted Government servant in service and the order of dismissal of the petitioner based on conviction is also justified in terms of proviso (a) to Article 311(2) of the Constitution of India and the State Government following the series of judgments of the Apex Court on the subject has modified its earlier circular on 28.10.2003 do away with the earlier circular dated 23.8.1963, no direction can be issued by this Court in exercise of power under Article 226 of the Constitution of India for reinstating the petitioner back in service till pendency of his Criminal Appeal No. 523 of 2000.

42. At this stage, it would be however relevant for this Court to also take into consideration the two judgments cited by the learned counsel for the petitioner in the case of Radhey Shyam Pathak (supra) and Ram Nandan Prasad (supra). From reading of the judgment of Radhey Shyam Pathak (supra), it would be dear that the Division Bench in paragraph No. 13 having noted the existence of the Circular dated 23.8.1963 to be in operation had held that any policy decision taken by the Government to regulate the conduct of its officers, even if it be not statutory in nature, should be held as binding in their conduct and the Government cannot be allowed to adopt a rule of pick and choose while enforcing such policy decision. In the present case, as noted above, the aforesaid Government circular has already been amended. It has to be also taken into account that the Division Bench having noted the observations made in the case of Mohammad Noon (supra) and extracted the relevant portion thereof had held that the disciplinary authority can be said to be quite competent to award appropriate punishment of dismissal, service or reduction in rank. Thus, in view of the change of circular as also the Division Bench also finding the circular dated 28.3.1963 of the State of Bihar to be contrary to the observations made in the case of Mohammad Noon (supra), this Court having also taken into account the rest of the submissions of the learned counsel for the petitioner including the plea of its being given retrospective operation and its rejection, will have now no difficulty in holding that dismissal of a Government servant of Bihar after his conviction by the competent court is well permissible

without waiting the result of the appeal.

43. As with regard to the judgment of Ram Nandan Prasad (supra), it would be found that learned single Judge of this Court having referred to paragraph No. 9 of the circular dated 23.8.1963 had revoked the order of dismissal but now when the said circular has itself been modified and the relevant part thereof has been amended, the said judgment can have no precedential value specially when the issue has been subsequently decided by the Apex Court in a large number of cases as referred above, laying down that there would be no need to await the result of the appeal of a convicted employee and that the order of dismissal against a Government servant can be passed on the basis of the judgment of conviction and sentence of the trial court.

44. This Court, therefore, would find that neither the order of dismissal of the petitioner from the service pursuant to his being convicted and sentenced by the court for offence u/s 304B of the I.P.C. with a life sentence can be held to be bad nor the use of power of the appellate authority, the Chief Secretary of the Government of Bihar in keeping his appeal pending till disposal of his criminal appeal, can be held to be improper exercise of power conferred upon the appellate authority in terms of Rule 6 of the 1935 Rules.

45. Before parting with, this Court would like to make it clear that it is not considering the other aspect as to whether the petitioner''s subsequent dismissal from service by a separate order dated 13.5.2002, on the ground of his initial appointment in Government being bad, would also disentitle him for his reinstatement in service till that order of dismissal is set aside, inasmuch as, learned counsel for the petitioner has himself submitted that if need be, the petitioner would assail that order dated 13.5.2002 separately. In that view of the matter, while that issue is left undecided, it must be held that for the time being, the petitioner has to wait for the disposal of his criminal appeal and if and when he is acquitted from his criminal charge in the pending criminal appeal, he may ask for review of the order of his dismissal in his appeal pending before the Chief Secretary, Government of Bihar, Respondent No. 2.

46. Subject to the aforementioned observations and liberty, this application is dismissed. Let a copy of this order be sent to the Respondent No. 2.