

BIHAR HUMAN RIGHTS COMMISSION
9, Bailey Road, Patna – 15

File Nos. **BHRC/COMP. 2461/10 & 777/11**

Case of Yeduvanshi Yadav & Md. Ashrafuddin

By a common order dated 8.10.2012 this Commission directed that disciplinary proceeding be initiated against Sri Brajesh Kumar, Executive Officer, Nagar Parishad, Supaul for his acts of omission and commission and non-implementation of the direction of this Commission, particularly in File No.777/11.

One Md. Ashrafuddin, Head Assistant-cum-Accountant of Supaul Nagar Parishad, suffered heart stroke and paralysis and consequently was not able to perform normal duties of the post. He applied for payment of salary of the post as per the provisions of section 47 of the Persons With Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act 1995 (for short 'the Disabilities Act'). The request having been turned down by the Nagar Parishad, he filed complaint before this Commission – registered as File No.777/11 – for intervention in the matter of payment of 'disability salary' In the complaint he inter alia stated that he was not being allowed to sign attendance register since November 2010 and in fact his name had been struck off from the attendance register on the ground of his disability.

Report was called from the Principal Secretary, Urban Development Department, and District Magistrate, Supaul brought on record the report of SDO Supaul dated 1.12.2011.

In his report, the SDO stated that the applicant had served the Nagar Parishad for years and his claim for payment of salary needs to be sympathetically considered in view of provisions of section 47 of the Disabilities Act. The matter was fixed for oral hearing. Sri Brajesh Kumar, Executive Officer appeared on behalf of Nagar Parishad. He stated that the Nagar Parishad had taken legal advice in the matter and as per the opinion of the advocate,

Nagar Parishad was not covered by the definition of 'appropriate government' in section 2(a) of the Disabilities Act.

Vide order dated 8.5.2012, the Commission rejected the stand of the Nagar Parishad pointing out that section 47 applies to all establishments and the term 'establishment' has been defined in section 2(k) of the Act to mean amongst other entities "local authority". Supaul Nagar Parishad being a local authority, the provisions of section 47 were clearly applicable to its employees.

It may be appropriate at this stage to quote section 47 of the Act in extenso as under:-

"47. Non-discrimination in Government employment
- (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

The following observations in the order dated 8.5.2012 (supra) may also be quoted:-

From bare reading of the above it is clear that the mandate of law contained in section 47 extends to all establishments, and under section 2(a) of the Act, the 'establishment' includes local authority among other things. As per section 47, every establishment is required to adjust an employee against any other post if he is not able to perform the duties of the post he has been holding, as a result of the disability, and where no such post is available, he has to be kept on supernumerary post until a suitable post is available, or he attends the age of superannuation, whichever is

earlier; but in no case can he be denied pay as admissible to the post held by him.

It would thus follow that the Nagar Parishad has no option but to continue paying him the salary of the post of Head Assistant-cum-Accountant to the applicant. If, in the opinion of the Nagar Parishad, the applicant is unable to perform the duties of the post held to him, he may be adjusted against any other available post, and if no post is available to him, against a supernumerary post which may be created co-terminus with the applicant's superannuation which is three years away as of now.

It is relevant to mention that in course of hearing on 8.5.2012 Sri Brajesh Kumar also stated that he had sought guidance from the Department. The Commission clarified that while seeking guidance from the Department may be part of the official business and procedure, no authority can sit over or act contrary to the mandate of law as embodied in section 47 of the Act. The Commission also observed that since the question of livelihood and therefore the protection of human rights of the applicant was involved, the Department would do well to issue instructions favourable to the applicant at the earliest.

When the matter was taken up for hearing on 17.7.2012 Sri Brajesh Kumar stated that he had written two letters to the Department on 22.6.2012 and 14.7.2012 – seeking instructions/guidance but “reportedly” the letters were not available in the Department. In any case, he had not received any instruction from the Department. Sri Ram Binod Singh, Under Secretary, Urban Development Department – appearing on behalf of the Principal Secretary – informed the Commission that by letter no.2414 dated 12.7.2012 instructions had been issued to the Executive Officer Nagar Parishad Supaul to implement the Commission's order dated 8.5.2012. He gave photocopy of the said letter to Sri Brajesh Kumar. The Commission observed in its order dated 17.7.2012 that the Department also having issued necessary instructions/guidance there is no difficulty in making payment as per the order dated 8.5.2012.

After reminder notice pursuant to order dated 28.8.2012 Sri Brajesh Kumar, Executive Officer submitted report dated 11.9.2012 to the effect that the matter was fixed for consideration by the Nagar Parishad Board on 14.9.2012. He submitted another report dated 20.9.2012 to the effect that the matter had been referred to the Nagar Parishad's Advocate for legal opinion.

In its order dated 21.9.2012 the Commission observed that the Nagar Parishad had earlier also taken legal advice from its advocate which was found to be not in accordance with law vide Commission's order dated 8.5.2012. The state government also in the meantime had issued a clear order directing that the disability salary be paid to the applicant as per the Commission's orders, and there was no justification to keep payment on hold. The Commission observed that a concerted effort was being made to circumvent not only the Commission's order but also the direction of the Department and in the circumstances, the conduct of Sri Brajesh Kumar needs to be examined by the Department for suitable action.

When the matter was taken up next on 8.10.2012 Sri Brajesh Kumar stated that meeting of the Board had not been convened for want of clear instructions from the Department and that direction has been sought on the point of payment as the applicant did not work during the relevant period and therefore, on the principle 'no work no pay', he was not entitled to salary.

The Commission noted in its order dated 8.10.2012 that it had earlier deprecated the conduct of Brajesh Kumar in scuttling the implementation of its orders and direction of the Government. The Commission clarified that principle of 'no work no pay' has no application in a case covered by section 47 of the Disabilities Act. It is not a case of voluntary refusal to perform duties; it is a case where work was/is not taken on account of one's disability. As a matter of fact, the provision was designed to cover situation where a person on account of his disability is unable to perform normal duties.

It may be relevant to mention here that the Urban Development & Housing Department had again, in the meanwhile, issued direction to the Executive Officer Nagar Parishad Supaul vide memo no.3317 dated 21.9.2012 to make payment stating that the applicant's case is covered by provisions of section 47 of the Disabilities Act. As a matter of fact, the Commissioner, Kosi Division Saharsa also vide memo no.768 dated 2.4.2013 later issued similar direction to the Executive Officer, Nagar Parishad, Supaul to make payment as per the order of this Commission and the direction of the Urban Development & Housing Department dated 21.9.2012 – pointing out the plight of the applicant on account of non-payment of salary and his illness.

Taking note of different orders and the attending circumstances, the Commission held that it was a fit case for initiating departmental proceeding against Sri Brajesh Kumar for his acts of omission and commission and accordingly made direction to that effect, vide order dated 8.10.2012.

Since Sri Brajesh Kumar is a member of Bihar Administrative Service and the authority/department competent to take such action was said to be the General Administration Department, copy of the order was sent to Principal Secretary, General Administration Department, besides Secretary, Urban Development & Housing Department for compliance/needful.

The General Administration Department vide its memo no.15515 dated 9.11.2012 sought explanation from the officer i.e. Sri Brajesh Kumar. From letter no.5607 dated 5.4.2013 of the General Administration Department it transpired that the explanation of the officer had been sent to Urban Development & Housing Department for its comments, which has since accepted the same and therefore, the General Administration Department did not propose to take any action against the officer.

Not satisfied with the report, the matter was fixed for hearing and taken up in presence of Secretary, Urban Development & Housing Department Sri S. Siddhartha and Joint

Secretary, General Administration Department Sri Anil Kumar on 9.5.2013. Sri Brajesh Kumar of course was also present and so was the applicant who appeared along with Advocate. Sri Siddhartha assured the Commission that he would re-examine the matter and submit fresh report within three weeks. Report was finally submitted after a reminder notice on 31.7.2013.

It is relevant to mention here that the report brought on record by the Secretary vide his letter dated 31.7.2013 is an unsigned report and it is not known as to what level the matter was examined or enquired into and by whom. Be that as it may, in his forwarding letter dated 31.7.2013 Dr. S. Siddhartha, Secretary, stated that Sri Brajesh Kumar had taken action “on time” and his explanation was “acceptable”.

The report being contrary to records and the earlier directions of the Urban Development & Housing Department itself vide its letters dated 12.7.2012 and 21.9.2012 (supra), the Commission again fixed the case for oral hearing and notice was issued to the Secretaries of Urban Development & Housing Department and General Administration Department, besides Sri Brajesh Kumar and the applicants.

When the matter was taken up on 5.9.2013 Sri Bashisht Singh, Addl. Secretary, appeared on behalf of the General Administration Department while Sri Rajeev Kumar, Deputy Secretary appeared on behalf of the Urban Development & Housing Department. Sri Brajesh Kumar did not personally appear and he was represented by advocate Sri Surya Narayan Yadav. Applicants were present and also represented by Advocate Sri A.K. Malik.

The attention of Sri Bashisht Singh and Sri Rajeev Kumar was drawn to the sequence of events, various orders passed by this Commission and the directions of the Urban Development & Housing Department; they made no attempt whatsoever to respond to the observations of the Commission or to defend the findings contained in the report. It may not be out of place to

mention that the letters dated 12.7.2012 and 21.9.2012 (supra) had been issued under the signature of Sri Rajeev Kumar. He stated that Secretary of the Department having taken a view on the explanation of Sri Brajesh Kumar, it was not open to him to go behind the same.

The Commission is of the view that it would have been better if the Secretary, Sri S. Siddhartha, had appeared himself. Be that as it may, having chosen not to personally appear and, instead, authorize the Deputy Secretary to represent him in the matter, the Commission finds no difficulty in considering the response of the officer on merit.

It is clear that the whole complaint is founded on and revolves around human right violations of the applicant. It is not in dispute that he suffered paralysis and heart stroke and he has been passing through bad times. He needs financial support for his livelihood and treatment. Fortunately for him, the Parliament of India has enacted a law viz. Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 section 47 of which guarantees full salary to the person afflicted with disability until the age of superannuation – on the same post held by him or any supernumerary post. But unfortunately for the applicant – if the Commission may say so, the officers do not share the same idea and sensitivity as the Parliament, and in utter disregard of the mandate of law, the Executive Officer, Supaul Nagar Parishad refused to pay salary despite the intervention of the Commission and the Department's directions, and the Department's Secretary has refused to take any action against the stubborn Executive Officer.

It is indeed strange that Sri Brajesh Kumar had the audacity to circumvent the implementation of the orders and direction of not only this Commission but those of the Department as well on one ground or the other. The Commission is of the view that it was the duty of the Department, especially the Secretary, to get the orders implemented and take suitable action

against the erring officer. At the time of hearing on 9.5.2013 Sri S. Siddhartha gave an impression as if this Commission's directions for taking action against the Executive Officer would be implemented but that was not to be. On an omnibus plea that the delay in implementation of the order was for procedural reasons, he declined to take any action against the officer.

The Commission would observe that letting off a disobedient, impudent and insensitive officer like Sri Brajesh Kumar encourages indiscipline and insubordination. The other aspect is lack of supervision & control over the subordinate officers. There is also lack of awareness that the mandate of law has to be enforced. Most importantly, it shows insensitivity to the plight of weak and needy which is a matter of concern. If the applicant was entitled to disability salary – and there can be no dispute on the point – it was the duty of the Department represented by Secretary to ensure payment to him and as head of the Department, it was also his duty that the officer circumventing the payment should be punished. Punishment is an integral part of justice delivery system and where a person is guilty of any misconduct, justice demands that he be punished for the same. It is clear that they have little concern for the handicapped and respect for law and institutions like Human Rights Commission.

The Commission is of the view that the insensitivity of the officer Sri S. Siddhartha and his lack of concern for the human rights of the under-privileged should be reported for appropriate action.

Before parting with the file, it may be mentioned that in course of hearing the Advocate representing Sri Brajesh Kumar stated that salary has been paid to the applicant. The statement was controverted by the applicant's Advocate who stated that only part payment has been made. It is not known as to whether the applicant is getting current salary but in any case, as observed in the earlier order dated 8.10.2012, even if payment was made later, this will not condone his acts of omission and commission and Sri

Brajesh Kumar cannot claim any credit for the same. Disciplinary action having been declined, the Department is equally to blame.

Having made these observations, the Commission is not inclined to keep these files pending and pursue the matter.

The files are accordingly closed.

Copy of this order may be sent to (i) the applicants, (ii) Secretary, Urban Development & Housing Department, (iii) Secretary, General Administration Department, and (iv) Sri Brajesh Kumar, the then Executive Officer, Nagar Parishad Supaul, since transferred.

Copy of this order may also be sent to Chief Secretary, Government of Bihar and Secretary, Department of Personnel and Training (DOPT), Ministry of Personnel, Public Grievances & Pension, Government of India, for such action as may be considered appropriate.

Date: 09.09.2013

Justice S.N. Jha
Chairperson