

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 665 OF 2004

Kisan Januba Kale
Age 55 years, Occ. Driver
R/o. Krishnanagar, Irrigation
Department, Sillod,
District Aurangabad

...Petitioner

versus

1. The State of Maharashtra
(Copy to be served on G.P.
High Court of Judicature
at Bombay, bench at Aurangabad)
2. The Superintending Engineer
Minor Irrigation, Sinchan Bhawan
near Akashwani, Jalna Road
Aurangabad
3. The Executive Engineer
Minor Irrigation Division,
Sinchan Bhawan, near Akashwani
Jalna Road, Aurangabad

...Respondents

.....
Ms. Vanita H. Sangole h/f Mrs. M.A. Kulkarni, advocate for the petitioner
Mr. S.D. Kaldate, A.G.P. for respondents
.....

**CORAM : A. V. NIRGUDE AND
V. K. JADHAV, JJ.**

**Date of Reserving
the Judgment : 04.09.2015**

**Date of pronouncing
the Judgment : 15.10.2015**

JUDGMENT (PER V. K. JADHAV, J.) :-

1. The petitioner was working as driver in Minor Irrigation

Division, Aurangabad. He was appointed as driver in the year 1985 on daily wages and in the year 1990, he was given regular pay scale. Thus, the petitioner was confirmed in service and was permanent employee.

2. On 17.7.1989, the petitioner was driving office jeep bearing registration No. MHZ 1220. At about 16.45 hours on Sillod-Aurangabad road, near village Babhulgaon, the jeep being driven by the petitioner gave a dash to one Buwajiba s/o Deojiba. The said Buwajiba sustained grievous injuries in the said accident. Consequently, said injured Buwajiba had filed Motor Accident Claim Petition No. 182 of 1989 for grant of compensation of Rs.70,000/- on account of injuries sustained by him in the said vehicular accident against the petitioner as a driver and the Executive Engineer, Minor Irrigation Department, as employer and owner of the jeep, involved in the accident.

3. The learned Member of Motor Accident Claims Tribunal, Aurangabad (hereinafter for the sake of brevity referred to as the "M.A.C.T."), by its judgment and award dated 29.11.1994 awarded the compensation of Rs.39,000/- to the said claimant Buwajiba alongwith interest @ Rs.12% p.a. from the date of filing of claim petition i.e. from 15.12.1989 till realization of the amount. The

learned M.A.C.T. further held that the present petitioner and the respondent No.3 herein, are jointly and severally liable to pay the said amount.

4. On 2.8.1995, the petitioner had received a communication dated 19.7.1995, issued by respondent No.3, thereby directing recovery an amount of Rs.70,000/- in 117 equal monthly installments of Rs.600/- each from the salary of the petitioner in lieu of amount of compensation alongwith interest deposited by respondent No.3 before M.A.C.T. Aurangabad in execution of award passed in M.A.C.P. No. 182 of 1989.

5. Being aggrieved by the said communication dated 19.7.1995, passed by respondent No.3, the petitioner had preferred Original Application No. 579 of 1995 before the Maharashtra Administrative Tribunal, Bench at Aurangabad (hereinafter for the sake of brevity referred to as the "Tribunal"). The learned Tribunal by judgment and order dated 6.2.2001 disposed of said Original application by directing the petitioner to make representation to respondent authorities pointing out the difficulties faced by him in making repayment of amount and also to what extent he accepts his liability. Learned Tribunal further directed that if such representation is made within three weeks, respondent authorities should take decision

within three months thereon. However, learned Tribunal in the said order has made it clear that respondent No.3 therein cannot recover the amount more than Rs.35,000/- from the petitioner in view of the fact that there is joint and several liability determined by the M.A.C.T. Meanwhile, the petitioner was directed to continue to make the payment of Rs.600/- p.m. till the decision is taken on his representation by respondent authorities. Furthermore, the petitioner was also granted liberty to challenge the decision if taken adversely on his representation.

6. Accordingly, the petitioner had filed his representation on 13.2.2001 to respondent No.2. Respondent No.2, by order dated 27.2.2002, directed recovery of amount of Rs.35,000/- from the petitioner.

7. Being aggrieved by the said order, the petitioner preferred Original Application No. 99 of 2002 before the Tribunal. However, the said Original Application came to be dismissed by order dated 20.12.2002. Learned Tribunal while disposing of Original Application No. 99 of 2002 has observed that the Tribunal has already fixed the liability of Rs.35,000/- on the petitioner and the petitioner is directed to make representation only to the extent of difficulties of paying the amount, as determined. The petitioner therefore, has preferred this

writ petition.

8. Learned counsel for the petitioner submits that, the learned Tribunal while disposing of Original application No. 579 of 1995 directed the petitioner to submit representation to respondent No.2 about difficulties, which he might have been facing in making the payment and also to what extent the petitioner accepts his liability. Learned counsel further submits that accordingly, the petitioner had submitted a detailed representation on 13.2.2001 raising various grounds, thereby denying the liability to pay compensation amount and the consequential recovery of said compensation amount from his salary. Learned counsel submits that petitioner has raised various grounds such as, that he is acquitted by the competent criminal court, holding that he was not driving the jeep in rash and negligent manner at the time of accident. The petitioner has also raised ground that the Government vehicle i.e. jeep involved in the accident was not insured at all and for which petitioner cannot be faulted, as it was the responsibility of respondent No.2 to get the said vehicle insured against third party risk. Learned counsel submits that third party insurance is compulsory and in case the vehicle involved in the accident was insured against third party risk, there could have been no responsibility casted on the petitioner or even on the department to pay the compensation. Learned counsel further submits that the

petitioner has also raised a ground that many times before the accident, he has requested his employer that the jeep involved in the accident is not in proper condition and it requires repairing. Even respondent No.3 has also informed to the superior Officers that said jeep is in condemned situation. However, neither the vehicle was replaced nor repaired, as suggested by the petitioner. Learned counsel thus submits that the accident had occurred on account of said condition of the jeep for which the petitioner cannot be held responsible.

9. Learned counsel for the petitioner further submits that respondent No.2 instead of considering representation submitted by the petitioner dated 13.2.2001, directed recovery of Rs.35,000/- from the salary of the petitioner by monthly installment of Rs.600/- in 59 installments. Learned counsel submits that respondent No.2 has not at all considered the representation submitted by petitioner and grounds raised therein. Counsel further submits that unfortunately, the Tribunal has also not considered the same while disposing of Original Application No. 99 of 2002. Learned counsel further submits that no departmental enquiry was held against the petitioner for causing loss to the Government by his act, which is unbecoming of the Government servant and merely on the basis of joint and several liability fixed by the M.A.C.T., has directed recovery of the said

compensation amount from the salary of the petitioner to the extent of Rs.35,000/-, as directed by the learned Tribunal. The learned counsel submits that said recovery from salary of the petitioner is incorrect, improper and illegal. Learned Tribunal has not considered vicarious liability of the employer to pay the compensation. In absence of any departmental enquiry, no recovery can be directed from the salary of the petitioner when criminal Court has acquitted the petitioner from the charges levelled against him. Learned counsel therefore, submits that the petition deserves to be allowed.

10. Learned A.G.P. for the respondents submits that as per directions given by the learned Tribunal, in Original application No. 579 of 1995 and Original Application No. 99 of 2002, the respondents have directed recovery of compensation amount paid by them in response to the award passed by the M.A.C.T., from the salary of the petitioner. The learned A.G.P. further submits that liability of petitioner was already fixed by the Tribunal while disposing of Original application No. 579 of 1995 and limited liberty granted to the petitioner was also considered by the Tribunal while disposing of Original Application No. 99 of 2002. Thus, the learned A.G.P. submits that writ petition is devoid of any merits and liable to be dismissed with costs.

11. Initially, by office order No. 145, the petitioner was informed by the respondents that compensation amount as awarded by the M.A.C.T. came to be deposited by the respondents and therefore, the said amount of Rs.70,000/- would be recovered from the salary of the petitioner @ Rs.600/- in 117 equal monthly installments commencing from April, 1995. Consequently, the petitioner had challenged the said order by filing Original application No. 579 of 1995 before the Tribunal. The learned Tribunal by its order dated 6.2.2001 directed the petitioner to make representation to respondent No.2 mentioning therein whatever the difficulties he might have been facing in making the repayment of the amount and to what extent he accepts his liability, within three weeks from the date of order and further directed the respondent authorities to take decision within three months from the date of such representation and communicate the same in writing to the petitioner. However, the learned Tribunal made it clear that the respondent authorities cannot recover more than Rs.35,000/- from the petitioner in view of the fact that there is joint and several liability fixed by the M.A.C.T. against the petitioner and the respondent authorities. Further the learned Tribunal had clarified that if the petitioner is aggrieved by the order on his representation, he would be at liberty to challenge the same before the Tribunal.

12. In view of the said directions, on 13.2.2001, the petitioner had filed his detail representation before the respondent authorities. The petitioner had resisted several grounds and prominent amongst them were that the competent criminal court has acquitted him in criminal case arising out of the said accident and therefore, the petitioner is not at all responsible for the payment. The petitioner has also raised a ground that the vehicle involved in the accident was not insured and it was not his fault. According to the petitioner, if the vehicle involved in the accident, was insured then there would have been no responsibility casted on the petitioner. The petitioner has also raised a ground that the vehicle was not in proper condition and condemned. Prior to the accident even the Sub Divisional Engineer also requested respondent No.3 that the vehicle is required to be condemned and to be replaced by another vehicle. It has also been contended that even no required repairs were carried out prior to the accident.

13. Respondent No.2 by order dated 27.2.2001 directed to recover amount of Rs.35,000/- in 59 equal monthly installments at the rate of Rs.600/- p.m. from the salary of the petitioner. It appears from impugned order dated 27.2.2001 that the grounds raised in the representations are not at all considered and even the opportunity of being heard on his representation was also not given to the

petitioner. The impugned office order No. 100 dated 27.2.2002 also passed in terms of order passed by respondent No.2. Since liberty was given to the petitioner in earlier Original Application, the petitioner had challenged the said order before the learned Tribunal by filing Original application No. 99 of 2002. The learned Tribunal disposed of the said Original application by observing that the matter was already concluded when the order was passed in earlier Original Application and thus directed the petitioner to make payment as per the earlier order passed by the Tribunal.

14. It thus appears that neither the authorities nor the learned Tribunal considered the grounds raised by the petitioner in his representation dated 13.2.2001. It is not disputed that the petitioner came to be acquitted by the competent criminal court for the charges levelled against him in respect of said motor vehicular accident. It is also not disputed that the vehicle involved in the accident was not insured. From certain correspondence, which are placed on record, it indicates that the Executive Engineer and Sub Divisional Engineer have informed respondent No.2 prior to the accident that the vehicle involved in the accident is not in roadworthy condition and it is liable to be condemned.

15. It appears from the record placed before us that the petitioner

was not subjected to any departmental enquiry for imposing said penalty in the form of recovery of amount either from the salary of the petitioner or from his retiral benefits.

16. In the case of ***Union of India vs. J. Ahmed, reported in 1979 SC 1022***, the question as to what generally constitute a misconduct especially in the context of disciplinary proceedings entailing penalty has been dealt with. The Apex Court in para 11 and 12 of the judgment has observed as under:-

“11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pearce v. Foster) (1886) 17 QBD 536 (at p. 542). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers)]. (1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Supdt., Central Railway, Nagpur Divn., Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K. Vaghela v. Moosa Raza, (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under :

“Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent

mistake, do not constitute such misconduct.”

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434 : (AIR 1966 SC 1051), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S. Govinda Menon v. Union of India, (1967) 2 SCR 566 : (Air 1967 SC 1274), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P. H. Kalyani v. Air France, Calcutta, (1964) 2 SCR 104 : (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be

indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabin-man signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking as instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil (see Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co.-op. Department Stores Ltd., (1978) 19 Guj LR 108 at p. 120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

12. The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea. We find it difficult to subscribe to this view because gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings."

17. In view of the aforesaid statement of law, we are of the considered opinion that there may be misconduct though may not involve the *mens-rea* and may still constitute misconduct warranting disciplinary action, negligence or recklessness in discharge of duties

and lapse in performance of duty or error of judgment of the employee may also be treated as misconduct if consequence directly attributable to such negligence. There can be no scope for doubt to hold that the negligence in driving of motor vehicle by the driver, as an employee, would constitute misconduct warranting disciplinary action against him. The grounds raised by the petitioner in his representation may or may not be in accordance with law. However, the respondent authorities should have at least examined the issue by holding departmental enquiry against the petitioner. Rule 10 of the Maharashtra Civil Services (Discipline and Appeal) Rules 1979 prescribes the procedure for imposing minor penalties. As per clause (iii) of Rule 5 of the said Rules, 1979, the recovery from payment of the employee whole or part of the pecuniary loss caused to the Government by negligence is minor penalty. The minor penalty can be imposed on the Government servant for good and sufficient reasons by following procedure, as required under Rule 10 of the Rules of 1979. Rule 10 of the Rules of 1979 reads as under:-

“10. Procedure for imposing minor Penalties.

(1) Save as provided in sub-rule (3) of rule 9, no order imposing on a Government servant any of the minor penalties shall be made except after -

(a) informing the Government servant in writing of the proposal to take action against him and of the imputations of misconduct or misbehaviour on which it is proposed to

be taken, and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal;

- (b) holding an inquiry in the manner laid down in rule 8, in every case in which the disciplinary authority is of the opinion that such inquiry is necessary;*
- (c) taking into consideration the representation, if any, submitted by the Government servant under clause (a) of this rule and the record of inquiry, if any, held under clause (b) of this rule;*
- (d) recording a finding on each imputation of misconduct or misbehaviour; and*
- (e) consulting the Commission where such consultation is necessary.*

(2) Notwithstanding anything contained in clause (b) of sub-rule (1), if in a case it is proposed, after considering the representation, if any, made by the Government servant under clause (a) of that sub-rule, to withhold increments of pay and such withholding of increments is likely to affect adversely the amount of pension payable to the Government servant or to withhold increment of pay for a period exceeding three years or to withhold increments of pay with cumulative effect for any period or to impose any of the penalties specified in clauses (v) and clause (vi) of sub-rule (1) of rule 5, an inquiry shall be held in the manner laid down in sub-rule (3) to (27) of rule 8, before making any order of imposing on the Government servant any such penalty.

(3) The record of the proceedings in such cases shall include-

- (i) a copy of the intimation to the Government servant of the proposal to take action against to him;*
- (ii) a copy of the statement or imputations of misconduct or*

- misbehaviour delivered to him;*
- (iii) his representations, if any;*
 - (iv) the evidence produced during the inquiry;*
 - (v) the advice of the Commission, if any;*
 - (vi) the findings on each imputation of misconduct or misbehaviour; and*
 - (vii) the orders on the case together with the reasons therefor.”*

18. We assume that the learned Tribunal by keeping in mind the aforesaid provisions of Rule 10 of the Rules of 1979, directed the petitioner to submit representation to the respondent authorities. It was thus, expected from the respondent authorities to consider the representation submitted by the Government servant under clause (a) of the said Rules 10 and record a finding on each imputation of misconduct or misbehaviour as alleged against the petitioner. In the case in hand, it does not reflect from the impugned order dated 27.2.2002 that office Order No. 100 dated 27.2.2002 that the respondent authorities have considered the representation of the petitioner and after recording the finding on imputation of misconduct of the petitioner, directed recovery from the retiral benefits of the petitioner. On the other hand, the respondent authorities have directed recovery from the salary and retiral benefits of the petitioner in terms of order passed by the Tribunal dated 6.2.2001. We are of the considered opinion that the approach of respondent authorities is improper, incorrect and illegal. The petitioner is now retired and the

said amount, as it is brought to our notice, is already recovered from the retiral benefits by the respondent authorities. During pendency of this writ petition, the petitioner is retired by attaining the age of superannuation some time in the year 2006. Now at this stage, it would not be proper to relegate the petitioner to the authorities again after a lapse of 12 years to consider his representation and pass appropriate orders thereon. Consequently, order dated 20.12.2002 passed in Original Application No.99 of 2002 by the Maharashtra Administrative Tribunal, Bench at Aurangabad is required to be quashed and set aside. The impugned order passed by respondent authorities dated 27.2.2002 is also required to be quashed and set aside. The respondent authorities are required to be directed to repay the amount of Rs.35,000/- recovered from the petitioner, to the petitioner. Accordingly we proceed to pass the following order:-

ORDER

- I. Writ petition is hereby allowed.
- II. The order dated 20.12.2002 passed in Original Application No. 99 of 2002 by the Maharashtra Administrative Tribunal, Bench at Aurangabad is quashed and set aside. The impugned order passed by respondent authorities dated 27.2.2002 is also quashed and set aside.

- III. We direct the respondents to repay the amount of Rs.35,000/- (Rupees Thirty five thousand only) to the petitioner within two months from today.
- IV. Rule is made absolute in the above terms. Writ petition is disposed of accordingly. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

(A. V. NIRGUDE, J.)

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