

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.7671 of 2008

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Sabir Ali, son of late Ashgar Ali, resident of Mohalla- Nazni Chowk, Ganj No.2,
P.S.- Bettiah, District- West Champaran (Bettiah).

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.
2. The Secretary –cum- Commissioner, Road Construction Department, Government of Bihar, Patna.
3. The Deputy Secretary –cum- Chief Vigilance Officer, Road Construction Department, Government of Bihar, Patna.
4. The Special Officer –cum- Deputy Secretary, Road Construction Department, Government of Bihar, Patna.
5. The Engineer –in- Chief –cum- Additional Commissioner –cum- Special Secretary, Road Construction Department, Government of Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. P.N.Pathak, Advocate
For the Respondent/s : Mr. Ujjwal Kumar Sinha, AC to AAG-3.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 03-10-2016

The petitioner has prayed for issuance of a writ in the nature of certiorari for quashing the notification bearing Memo No.11681(S) dated 4.10.2007 of the State Government whereby the following punishments have been imposed on the petitioner:

- (i) Reduction at the minimum of the pay-scale of Executive Engineer;
- (ii) Censure to be entered in his Annual Character Roll for the year 2000-01;
- (iii) Recovery of 50% of the expenditure made in the construction of the road from Tetariya More to Udwant Nagar to the tune of Rs.3,80,000/- in 19 instalments;

and

- (iv) Restriction of pay and allowances for the suspension period to the subsistence allowance drawn during the said period.

With the consent of the parties the writ petition has been heard with a view to its final disposal at the stage of admission itself.

The petitioner holds the post of Executive Engineer and was posted in the Shahabad Road Division in the district of Bhojpur during period 22.6.2000 to 3.7.2001. In contemplation of a departmental enquiry the petitioner was put under suspension vide Memo No.519(S) dated 28.8.2001 of the Joint Secretary, Road Construction Department, Government of Bihar, Patna. Vide Notification bearing No.6204(S) dated 10.9.2001 charge-sheet was served upon the petitioner listing six charges, a copy of which is placed at Annexure-2 which are as follows:

- (i) **Charge No.1:** A fund to the tune of Rs.1.5 crores was allotted by the District Rural Development Agency to the Rural Engineering Organization under a scheme and even after six months of posting of the petitioner, no progress took place in the Haksi Yojna even when the District Magistrate, Gaya had issued directions for utilizing the funds. The petitioner thus holding the post of Executive

Engineer failed to discharge the obligation attached to the post.

- (ii) **Charge No.2:** Ara-Sasaram road is an important road and at kilometers 4 to 50, was in very bad condition requiring widening as well as strengthening under Naxal Work Scheme and despite such position the petitioner has failed to get the work executed by the Contractor M/s Vishal Wiltake India Company Limited since after March, 2000 although directions were issued by the Superintending Engineer, Bhojpur Road Circle, Ara for starting work immediately without delay. The petitioner was also directed that in case the contractor is not ready to start the work then necessary action be taken against him, yet nothing was done by the petitioner to start the work.

The petitioner has unilaterally and without taking any prior permission from the superior authorities and without submitting any work estimate, has taken a decision to fill up the potholes on the road in question under the Road Sub-Division, Piro and has issued direction to Pashupati Singh, Junior Engineer, Piro Branch-2 for filling up potholes even when Dadan Singh, Assistant Engineer was posted in the Road Sub-Division

and despite an order restraining the Junior Engineer from executing work having been issued by the Superintending Engineer, Road Division in his letter no.1009 dated 23.12.2000, the petitioner has colluded with the Junior Engineer to execute the work at the cost of Rs.3,80,000/-.

The petitioner has deliberately not proceeded against the Contractor and has conspired to defalcate the money in collusion with the officer posted in a different branch ignoring that there was an Assistant Engineer posted in his own branch.

(iii) **Charge No.3:** The Engineer-in-Chief –cum- Additional Commissioner -cum- Special Secretary vide letter bearing No.6339 dated 10.8.2000 had granted sanction to the Executive Engineer, Road Division, Ara for construction of 15 roads falling under the Division at a cost of Rs.158.47 lacs and according to the statutory prescription a sum equivalent to 10% could only be used for repair of potholes but the petitioner has already spent 14.25 lacs in repair of potholes and Rs.8.53 lacs in issuing tender for construction of culvert and besides Rs.40 lacs has been sanctioned for other work which is contrary to the guidelines.

(iv) **Charge No.4:** The petitioner has approved a tender for

an amount of a little less than 10 lacs for publication of tender in the newspaper which is contrary to the guidelines of the Cabinet Vigilance Department's letter No.452 dated 30.3.1982, Letter No.41 dated 11.1.2001 and letter No.1308 dated 23.12.2000.

- (v) **Charge No.5:** Despite the demand by the Superintending Engineer for submission of proposal for construction and repair work of culvert the petitioner did not deposit any proposal, although the newspapers have reported that the work is in progress. In this regard the petitioner has approved some estimates for such constructions for which he is not competent.
- (vi) **Charge No.6:** The petitioner has issued no objection for construction of shop adjacent to Circuit House, for which he is not a competent officer.

Surprisingly even though six allegations were set up against the petitioner but the charge memo refers to only two evidences on which the department seeks to rely for driving home the charges. Evidence no.1 is letter dated 6.2.2001 of the Superintending Engineer which is practically the foundation for the proceedings and Evidence no.2 which is a letter dated 27.11.1998 of the District Magistrate, Gaya recommending transfer of the petitioner.



The petitioner filed an exhaustive reply, a copy of which is present at Annexure-3 meeting each of the charges. The Enquiry Officer submitted his report on 19.12.2001 to the Joint Secretary, Road Construction Department, a copy of which is placed at Annexure-4. The Enquiry Officer has exonerated the petitioner from each of the charges. The petitioner was served with the notes of disagreement bearing Memo No.8751(S) dated 13.10.2003 which returned unserved and was served vide letter dated 5.12.2003 which letters are enclosed at Annexures- 6(B) and 6(A) respectively. The Special Officer –cum- Deputy Secretary, Road Construction Department communicating the views of the Disciplinary Authority has directed the petitioner to respond to the issues mentioned in the memo dated 13.10.2003 present at Annexure-6(B) and which is stated to have been responded by the petitioner although the reply of the same is not on record. The Disciplinary Authority in consideration of the enquiry report and the response of the petitioner has proceeded to pass the punishment communicated vide notification dated 4.10.2007 impugned at Annexure-1. The petitioner feeling aggrieved is before this Court.

While Mr. P.N. Pathak, learned counsel has argued for the petitioner, his argument has been contested by Mr. Ujjwal Kumar Sinha, learned Assisting Counsel to Additional

Advocate General No.3.



It is the argument of Mr. Pathak that even in absence of any charge either on misappropriation or defalcation and on mere discretion exercised, that the petitioner has invited the punishment in question even though he happens to be the incharge of the work in question and the execution thereof is his responsibility. He submits that though the petitioner has been exonerated from all charges by the Enquiry Officer yet the Disciplinary Authority on a mere difference in opinion and without expressing any reasons, has proceeded to punish the petitioner. It is submitted that the allegations on record do not constitute any misconduct in absence of any evidence confirming any statutory violation, misappropriation or defalcation by the petitioner or of providing unjust gains to himself or others. He submits that the order of penalty is based on no evidence rather is based on whims of the Disciplinary Authority and which would not constitute a misconduct.

The arguments of Mr. Pathak has been contested rather seriously by Mr. Sinha appearing for the State and he submits that each of the charges levelled against the petitioner exhibited financial irregularity and in the circumstances the punishment is appropriate. While advancing the argument on limited scope for intervention in a disciplinary proceeding he



submits that since no procedural error has been found in the proceedings where the petitioner has been given ample opportunity to defend himself and the charges have been found proved by the Disciplinary authority, a mere change in opinion would not render the order of the Disciplinary Authority perverse. Learned counsel refers to a judgment of the Supreme Court since reported in **(2015)2 SCC 610 (Union of India vs. P. Gunasekaran)** to submit that in the attending circumstances, the punishment imposed not being shocking to the conscience of this Court, this Court may not enter into the proportionality of the punishment.

Mr. Pathak in his short rejoinder has argued that although the Enquiry Officer has supported the work but even going by the finding recorded by the Disciplinary Authority since the alleged loss suffered by the State has since been recovered, there is no occasion for a reduction of pay-scale of the petitioner in absence of any finding as to the misconduct.

I have heard learned counsel for the parties and I have perused the records.

Of the six charges framed against the petitioner, while the Disciplinary Authority agreeing with the findings of the enquiry officer on the charge nos.1 and 5 has dropped the same, he has yet proceeded with Charge nos.2, 3, 4 and 6. While charge nos. 2, 3 and



4 are practically overlapping, charge no.6 relates to a different transaction. Charge no.2 is at the centre of the things and in my opinion, if the petitioner's explanation as found in his reply present at Annexure-3 as accepted by the Enquiry Officer would reflect a possible explanation then in my opinion a mere difference in opinion by the Disciplinary Authority in absence of any finding as to the integrity, a statutory violation or ill motive behind the act, may not be sufficient for imposition of penalty. Charge no. 2 as can be seen from the charge memo present at Annexure-2 questions the petitioner on his discretion to fill up the potholes on the Ara-Sasaram road which cost the State a sum of Rs.3,80,000/-. The charge itself takes notice of the attitude of the Contractor who has failed to execute the work. The petitioner in justification of the action taken by him to fill up the potholes occurring at kilometers 4 to 50 with Jhama metal/brick bats and not stone metal, has explained the position on the exigency of situation. The petitioner has not only explained the position but has also referred to the two evidences which finds mention in the charge memo i.e. letter dated 27.11.1998 of the District Magistrate, Gaya whereby the District Magistrate had requested the Engineer-in-Chief –cum- Special Secretary, Rural Engineering Department to transfer the petitioner from his post in the Rural Engineering Organization, Works Division, Gaya and the letter dated 6.2.2001 of the Superintending



Engineer which is said to be the foundation for the Charge nos. 2 to 6. The petitioner has mentioned at paragraphs 4(vii) of his reply present at Annexure-3 that he had used Jhama, brick bat for making the road motorable and which discretion of the petitioner cannot be termed as a defalcation. The Enquiry Officer in his report has considered the charge no.2 at paragraph 5.2 and has upheld the discretion used by the petitioner of using Jhama and brick-bat for making the road in question motorable and which work, according to the Enquiry Officer, was found to be durable. Meaning thereby the work quality was not found to be wanting.

What I find from the charge, the explanation given by the petitioner, the finding recorded by the Enquiry Officer on charge no.2 and the final opinion of the Disciplinary Authority as reflecting in the order impugned at Annexure-1 is, that whereas according to the Disciplinary Authority, the petitioner should have used stone metal, he used the Jhama metal with brick bats which incurred a cost of Rs.3,80,000/- and this work was done by the Junior Engineer of a different branch even when there is an Assistant Engineer posted in the Road Division. One fails to appreciate as to how such act of the petitioner would constitute a 'misconduct'. A discretion is exercised as per wisdom of the Executive Engineer who admittedly holds charge in so far as execution of road construction work is concerned and is also amply



empowered to take quick decision as per the situation. Another Admitted position is that there was a dispute with the Contractor who had delayed the execution and the road in question required immediate attention. Now in such situation, a decision taken by the petitioner to make the road motorable even if it was not to the satisfaction of the Disciplinary Authority yet until such time that it made a dent in public revenue or the loss was irreversible or the execution of work in the manner done exhibited an element of nepotism or providing unjust gain to himself or to someone else, a mere discretion leading to difference in opinion as to the manner in which the road should have been constructed, cannot constitute a misconduct under the Discipline Rules.

While charge no.3 has charged the petitioner of exceeding his limit in expending over filling of potholes, charge no.4 holds him of not advertising the work. In response to the necessity of advertisement the petitioner has referred to an oral instruction given by the Superintending Engineer and submits that even though he was in the knowledge of the advertisement but no order was issued to cancel the same. The Enquiry Officer has accepted that in the nature of allotment made for repair work an excess of Rs.1.23 lacs is negligible amount for being noticed in extreme circumstances and in so far as the issue of advertisement is concerned, the Enquiry Officer has given a benefit of doubt to the

petitioner.

In so far as charge no.6 is concerned, it is the specific stand of the petitioner that it is on the direction of the Minister concerned that he gave a conditional 'No Objection Certificate' for construction of the shop subject to approval by competent authority and which statement of the petitioner has been found to be true. A copy of the order issued by the Minister was also exhibited by the petitioner and the Enquiry Officer has thus found no illegality in the action of the petitioner which was in compliance of the direction of the Minister.

Mr. Sinha, learned counsel appearing for the State has rightly argued that the scope of interference by the High Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India in entering into the punishment aspect, is restrictive but then it is equally true that imposition of penalty cannot be a mechanical exercise and until such time that the decision is resting on circumstances warranting such punishment, it would be an abuse of a quasi-judicial power vested in the Disciplinary Authority. Neither in the charge memo nor in the notes of disagreement or in the punishment order, is the petitioner charged of a misconduct. It is not a case where the petitioner was not vested with the jurisdiction rather it is the discretion exercised which is put to question and is being treated as a misconduct for



inviting a punishment. Again there is no charge that the petitioner did act for personal gains or to provide gains to the others nor there is any evidence on record which would constitute a defalcation. Although charge of defalcation is made but as I have said that there is no evidence to support that. A casual aberration in discharge of duty unless results in serious consequences, would not render the act by the delinquent a misconduct. In this regard I deem it necessary to refer to two judgments of the Supreme Court rendered on the issue. The Supreme Court in the case of **Union of India vs. J. Ahmad** since reported in (1979) 2 SCC 286 while testing the charges leveled against the respondents in the said case has concluded on the issue of misconduct at paragraphs 9 and 11 as follows:

“9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, Charge 2 refers to the quality of lack of leadership and Charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to



discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words “act or omission” contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 (“Conduct Rules” for short). The Government has prescribed by Conduct Rules a code of conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding responsible post or lack of aptitude or qualities of leadership would not constitute as failure to maintain devotion to duty. The expression “devotion to duty” appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can be safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of

misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.
.....”

While taking note of the dictionary meaning of the word

“misconduct”, the court has held in paragraph 11 as follows:-

“11... ..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 Vs. Air France, Calcutta, 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 instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous

death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see *Navinchandra Shakerchand Shah v. Manager, Ahmedabad Coop. Department Stores Ltd.*⁸). 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.”

A similar view was taken by the Supreme Court in a judgment reported in **AIR 1992 SC 2188 (State of Punjab Vs. Ram Singh)**. Para 4 and 5 of the judgment reads thus:

“4. Misconduct has been defined in Black’s Law dictionary, Sixth Edition at page 999 thus:

‘A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, its synonyms are misdemeanour, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness.’

Misconduct in office has been defined as:

“Any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. The term embraces acts which the office-holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act.”

In *P. Ramanatha Aiyar’s the Law Lexicon*, Reprint Edition 1987 at p.821, ‘misconduct’ defines thus:

“The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance,



misconduct means a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand and carelessness, negligence and unskillfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected.”

5. Thus it could be seen that the word ‘misconduct’ though not capable of precise definition, its reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve.”

The case in hand has lacuna galore. Whereas the petitioner is being questioned at his discretion to carry out the emergent work with no evidence doubting his integrity, the Enquiry Officer in consideration of the materials on record exonerates him. The note of disagreement present at Annexure-6(B) does not satisfy the requirements for it is no more than, in the nature of a post decisional opportunity to the petitioner. There is complete absence of reasons in the notes of disagreement, to the finding recorded by

the Enquiry Officer on charge nos.2, 3, 4 and 6. In fact the show cause present at Annexure-6(B) is more of a show cause against the proposed penalty with the guilt upheld.

Rule 18(2) of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 is not an empty formality rather an onus is cast upon the Disciplinary Authority to decide whether the Disciplinary Authority would accept the enquiry report with the findings of the Enquiry Officer or would disagree with the findings on any of the article of charges and for which he is to record his reasons. The recording of reasons by the Disciplinary Authority is a mandatory duty cast which needs to be discharged. In so far as the case in hand is concerned, the Disciplinary Authority while accepting the findings of the Enquiry Officer on charge nos. 1 and 5, has chosen to just ignore the finding of the Enquiry Officer on charge nos.2, 3, 4 and 6 to conclude on the guilt simply on the charges framed. As I have said no reasons have been assigned to differ with the findings recorded by the Enquiry Officer as against charge nos.2, 3, 4 and 6. The findings of the Enquiry Officer on charge nos.1 to 5 are practically interwoven even if charge no.6 is distinct. It is apparent that the proceeding was initiated with premeditated mind of upholding the guilt of the petitioner and the Disciplinary Authority has not chosen to differ from the said position.



As held by the Supreme Court in the case of **J. Ahmad** (supra) at paragraph 11 an error of judgment, a negligence in performance of duty, a lapse of performance of duty or an error of judgment in evaluating the developing situation may question a delinquent in his discharge of duty but would not constitute a misconduct unless the consequences are irreparable and the resultant damage shows a high degree of culpability. The Supreme Court has also held that failure to attend high standard of efficiency in performance of duty as expected of an employee may cost him his further promotion but would not constitute a misconduct. In my opinion a violation of a prescribed procedure may put an employee to a questionnaire but it is not necessary that every questionnaire has to result in imposition of penalty and if the employee has given a possible explanation to his action, it is about time that the Disciplinary Authority concerned apply their mind on the necessity of imposition in the backdrop of the act complained of.

The charges levelled against the petitioner even if taken on its face value, can at best be a case of an error of judgment or a case of overreach while exercising discretion but it yet does not constitute a misconduct for imposition of an extreme penalty of reduction of the petitioner to the minimum of the scale of the Executive Engineer, in absence of evidence supporting the charge.

For the reasons aforementioned the notification bearing

Memo No.11681(S) dated 4.10.2007 of the State Government imposing penalty cannot be upheld and is accordingly quashed and set aside.

The writ petition is allowed. The petitioner shall be entitled to all consequential reliefs which shall be paid to him within a period of three months from the date of receipt/production of a copy of this order.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
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