

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3419 of 2014

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Upendra Choudhary, Son of Late Ganesh Choudhary, Resident of Itahari, P.O.-
Fudkichak, P.S. - Gogari, District - Khagaria.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Commissioner -cum- Secretary, Rural Development Department, Govt. of Bihar, Patna.
3. The District Magistrate, Munger.
4. The Executive Engineer, Rural Development Department, Special Division, (Divisional Commissioner), Munger.
5. The Executive Engineer, Rural Works Department, Works Division, Khadagpur/Tarapur, Munger.
6. The Superintending Engineer, Rural Development, Special Circle, Munger, District – Munger.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Siya Ram Shahi, Advocate Ms. Shailly Kumari, Advocate
For the Respondent/s	:	Mr. Anil Kumar Sinha, GA-1 Mr. Nikhil Kr. Agrawal, AC to GA-1 Ms. Aditi Hansaria, AC to GA-1

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 07-12-2016

Heard Mr. Siya Ram Shahi, learned counsel appearing
for the petitioner and Mr. Nikhil Kumar Agrawal, learned Assisting
Counsel to Government Advocate No.1 for the State.

The petitioner is aggrieved by the order bearing Memo
No.966 dated 14.8.2010 passed by the Executive Engineer, Rural
Works Department, Work Division-2, Munger, whereby in
consideration of the recommendation made by the District
Magistrate, Munger in his letter bearing No.2446 dated 24.8.2008,
the petitioner is directed to deposit an amount of Rs.5,17,906/-



stated to be the amount spent on the construction of school building which was found to be of quality of such nature that it was not fit for school activities and could even collapse. The order is impugned at Annexure-7 to the writ petition.

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 writ petition has a long history. A show cause notice was published in the newspaper on 27.9.2008 charging the petitioner of utilizing an amount of Rs.3,71,200/- for carrying out the repair work in a school building which was found to be of a very low quality and not fit for school activities. The petitioner by the show cause was not only directed to deposit the principal amount but also to deposit the interest of Rs.1,46,706/- in the light of the direction issued by the District Magistrate dated 24.8.2008. A copy of the public notice is on record at Annexure-3. The petitioner feeling aggrieved came before this Court in CWJC No.15931 of 2008 but without success as the writ petition was dismissed vide order dated 28.10.2009, a copy of which is present at Annexure-4. Feeling aggrieved the petitioner preferred Letters Patent Appeal giving rise to LPA No.297 of 2010. Even the Division Bench did not interfere with the process and directed the petitioner to file his



reply within six weeks. The respondents were restrained from taking coercive measures until disposal of the matter, A copy of the order of the Division Bench is placed at Annexure-5.

According to the petitioner, he filed his explanation vide Annexure-6 which was received on 27.3.2010 in the office of the Executive Engineer, Rural Works Department but the Executive Engineer while passing the order impugned dated 14.8.2010, has denied it and recorded that neither any explanation had been filed nor the petitioner attended the proceeding resulting in the impugned order.

On the other hand, the petitioner filed a contempt application for the failure of the respondents to abide by the direction passed by the Writ Court as confirmed by the Appellate Court giving rise to M.J.C. No.2347 of 2010 and the Division Bench in view of the order dated 14.8.2010 disposed of the contempt proceeding giving liberty to the petitioner to take recourse to the lawful remedy so available to him. A copy of the order passed by the Division Bench on the contempt application is present at Annexure-8. The petitioner did nothing thereafter nor did the respondents initiate any proceeding for recovery. The matter rested at that stage.

It is two years after the passing of the order impugned



dated 14.8.2010 that a formal proceeding was initiated against the petitioner under the provisions of the Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (hereinafter referred to as 'the Rules') by service of a charge memo vide Memo No.134 dated 6.2.2012 impugned at Annexure-9 and it is a matter of record that charge no.1 present therein is in respect of the default in the construction of the school building which is the foundation for the order impugned dated 14.8.2010. The petitioner responded to the charge by filing his reply vide Annexure-10 and the proceedings culminated in an order of penalty bearing Memo No.663 dated 11.6.2013 passed by the Engineer-in-Chief (Central) and who has been pleased to impose the following penalty on the petitioner for the charges which include the charge of construction of a low quality school building:

- (a) Censure for the year 2004-05;
- (b) Stoppage of two annual increments without cumulative effect; and
- (c) Reduction of pay and allowances for the suspension period to the subsistence allowance drawn by the petitioner during the said period.

It is not in dispute that the petitioner has filed a statutory appeal against the order of penalty passed in the disciplinary



proceedings present at Annexure-12 and which has not yet been disposed of.

Mr. Shahi, learned counsel appearing for the petitioner has questioned the order dated 14.8.2010 passed by the Executive Engineer on the issue of jurisdiction. While accepting that there is a delay in moving this Court against the order impugned despite liberty granted by the Division Bench while disposing of the contempt application vide Annexure-8, he submits that since no proceeding for recovery followed the order and in the meantime the disciplinary proceedings on the same set of charges which included charge which is the foundation for the recovery order had since been instituted, hence the delay. He submits that while the order passed in the disciplinary proceeding is a subject matter of appeal but the order passed by the Executive Engineer not being part of the disciplinary proceeding is being questioned on the issue of jurisdiction. According to Mr. Shahi, the Executive Engineer has no jurisdiction to direct the petitioner to deposit the amount in question not being his Disciplinary Authority. Mr. Shahi has also tried to question the orders on merits but considering that the order is passed on a charge that the petitioner was a party to the low quality works which is one of the charges in the disciplinary proceedings which is awaiting adjudication by the appellate authority, I would not enter



into the merits of the order.

Per Contra it is the argument of Mr. Agrawal, learned Assisting Counsel to G.A.-1 that whereas the writ petition is hopelessly delayed, once the punishment order has been passed against the petitioner it justifies the recovery order. He further submits that the petitioner cannot be permitted to question the order on jurisdiction because he had the opportunity while raising the issue in the earlier round of proceedings but this Court did not interfere with the proceedings so initiated rather directed him to file his reply and thus once the issue has attained finality, the petitioner cannot turn back to question the order on jurisdiction. While admitting to the fact that the foundation for the impugned order directing for initiating process of recovery is also a charge in the disciplinary case he submits that the very fact that the charge has been upheld, the order requires no interference.

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

No doubt the writ petition is grossly delayed. An order of 2010 is being challenged after four years. Considering the order in isolation and in the light of the orders passed by this Court in the earlier round of litigation finally culminating in the contempt order passed by the Division Bench in MJC No.2347 of 2010, whereby a



liberty was granted to the petitioner to question this order in an appropriate proceeding and considering that the Division Bench order was passed as back as on 15.9.2010 this writ petition should have been rejected on grounds of laches and delay but then the issues which crop up for consideration in this case and does not persuade this Court to dismiss the case *in limine* on grounds of delay rather persuades this Court to consider the case on merits, are:

- (a) Whether the Executive Engineer was vested with the jurisdiction to pass such order ;
- (b) If the Answer to the issue posed at item no.(a) is in affirmative then whether the delay has wrested the right of the petitioner, to question this order;
- (c) Whether the delay is explained by absence of recovery proceedings; and
- (d) Whether the charge which is the foundation for the order dated 14.8.2010 also being one of the charges in the formal disciplinary proceeding initiated against the petitioner vide Annexure-9 and the proceedings having culminated in the punishment order which does not envisage recovery, the order is sustainable.

In my opinion, the writ petition is fit to be allowed on all the counts. In so far as the delay is concerned, considering that the



order directing the petitioner to deposit the amount in question under threat of recovery proceeding not having been translated into a formal recovery proceeding, the avenue was still open for the petitioner to question the order on jurisdiction as well as on merits. An additional feature which draws in favour of the petitioner is that the very foundation for the order passed by the Executive Engineer impugned at Annexure-7, is also charge no.1 in the disciplinary proceeding. Meaning thereby whatsoever was the delay in questioning the order the petitioner is saved by initiation of a formal disciplinary proceeding for the same charge and thus the order of the Executive Engineer merges in the disciplinary proceedings initiated against the petitioner.

Reverting back to the issue on contest, it is not in dispute that the Disciplinary Authority of the petitioner, is the Engineer –in-Chief and not the Executive Engineer. The order impugned herein simply asks the petitioner to deposit an amount of Rs.5,17,906/- failing which recovery proceeding would ensue. It is not in dispute that this order has been passed simply on a show cause asked by the Executive Engineer who admittedly is not the Disciplinary Authority of the petitioner. In my opinion, even if the Executive Engineer in consideration of the matter in contest was of the opinion that the petitioner was liable to deposit the amount in question yet a final



decision in this regard could not have been taken by him rather he should have referred the matter to the Disciplinary Authority to proceed in accordance with the provisions of 'the Rules' for imposition of penalty so provided under rule 14 which also includes penalty for recovery. Unfortunately the Executive Engineer has arrogated this power to himself. The order thus is confirmingly without jurisdiction.

Though a persuasive argument was advanced by Mr. Agrawal relying upon a judgment of this Court in the earlier round of proceedings but in my opinion, neither has this Court in the earlier round of proceedings adjudicated on the issue of jurisdiction nor in view of the settled principles, such power could have been conferred on an authority not vested with the jurisdiction under 'the Rules'. In either of the situation the Executive Engineer had no jurisdiction to adjudicate on the issue for the jurisdiction stood reserved in the Disciplinary Authority.

There is a second facet of the matter. I have already observed that the very foundation for recovery proceeding, is also charge no.1 in the disciplinary proceeding and the Disciplinary Authority in consideration of the charge and in consideration of the evidence on record has, while imposing a penalty of censure and stoppage of two annual increments without cumulative effect, not



chosen to impose the penalty of recovery even though the recovery order impugned herein was existing on that day. Meaning thereby the Engineer –in- Chief as the Disciplinary Authority, in consideration of the explanation given by the petitioner has not thought it prudent to order for recovery.

In the circumstances so discussed where a formal proceeding initiated on the charge which is the basis for the impugned order of recovery, has not concluded in an order of penalty directing for recovery, the order bearing Memo No.966 dated 14.8.2010 passed by the Executive Engineer, Rural Works Department, Work Division-2, Munger impugned at Annexure-7 becomes unsustainable and is accordingly quashed and set aside.

The writ petition is allowed.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21-12-2016
Transmission Date	NA

