

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.2918 of 2014

1. Abdul Rab Son of Late Khwaja Moinuddin Resident of Flat No. 104, Naaz Apartment, Indirapuri Colony, P.S. - Shashtri Nagar, District - Patna

.... Petitioner/s

Versus

1. The State of Bihar
2. The Secretary, Road Construction Department, Bihar, Patna
3. The Engineer-In-Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, Bihar, Patna

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Prabhu Nath Pathak, Adv.

For the Respondent/s : Mr. Anant Prasad Singh, SC 15

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 06-10-2016

Heard Mr. Prabhu Nath Pathak, learned counsel for the petitioner and Mr. Anant Prasad Singh, S.C.15 for the State.

The matter has been heard with the view to final disposal at the stage of admission with the consent of the parties.

The petitioner is aggrieved by the order bearing Memo No.2694E dated 6.5.2013 passed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Secretary, Road Construction Department, Government of Bihar, Patna whereby an order of punishment of withholding two annual increments with non cumulative effect has been passed against the petitioner. The order of penalty further stipulates that a separate order would follow as



regarding the period under suspension. A copy of the order of penalty dated 6.5.2013 is impugned at Annexure-8 to the writ petition. The petitioner filed a review application against the order of penalty and which has been rejected vide order bearing Memo No. 3314 dated 25.7.2014 placed on record vide Annexure-10 to I.A.No.1739 of 2015 and on the same date the disciplinary authority has also rejected the prayer of the petitioner for regularisation of his period of suspension vide an order bearing Memo No.3315 E dated 25.7.2014, a copy of which is placed at Annexure-12.

Having heard learned counsel for the parties and considering that the orders placed on record in the interlocutory application at Annexures-10 and 12 are consequential in nature to the principal relief prayed in the writ petition, the prayer made in I.A.No.1739 of 2015 is allowed. The petitioner is permitted to question the two orders in the present writ petition as well.

Facts of the case briefly stated is that the Secretary, Road Construction Department, Government of Bihar carried out a surprise inspection on National Highway No. 30A and when he found that the National Highway under the Fatwa-Daniyawar-Faridpur section in between 0 to 11 kilometers was not in a good condition and despite repeated orders being issued by the Headquarters, no steps were taken



for its improvement although the road was under the 'defect liability period'. The Secretary also found that the road at 13 kilometers at Navichak and 14 kilometer at Faridpur was in an alarming condition. The petitioner holding the post of Junior Engineer was charged with dereliction in duty and of negligence and thus proceeded under Rule 3(1)(i & ii) of the Bihar Government Servant Conduct Rules 1976 and a disciplinary proceedings was initiated. An office order to this effect bearing Memo No.6360 dated 1.12.2011 is present at Annexure-1. A chargesheet was served on the petitioner vide office order bearing Memo No.6962 dated 27.12.2011, a copy of which is present at Annexure-2. The petitioner submitted an exhaustive explanation to the default pointed out and which runs into 22 pages. A copy of the same is enclosed at Annexure-3. The disciplinary authority i.e. the Engineer-in-Chief-cum-Additional Secretary Road Construction Department appointed himself as the Enquiry Officer and proceeded with the enquiry, the report of which is placed at Annexure-4. The disciplinary authority while discharging the role of an Enquiry officer has bifurcated the allegations into three parts and while not finding any default in the explanation given by the petitioner as regarding the first and second part of allegation, he concludes that the explanation to the third part of the allegation was not satisfactory and the



allegation was partially upheld. The reason according to the Enquiry Officer is, that the petitioner could have performed better and that there was lack of effort on the part of the petitioner to achieve the required standards in the construction of the road. The enquiry report is at Annexure- 4 and it is proceeding therefrom that the order of penalty has been passed by the same authority i.e. the Engineer- in Chief- cum- Additional Secretary now as the Disciplinary Authority impugned at Annexure-8 after serving the petitioner with the copy of the enquiry report vide Annexure-6 and receiving an explanation thereto vide Annexure-7.

As I have already mentioned, a review against the order of penalty filed by the petitioner vide Annexure-9 has been rejected by the Disciplinary Authority vide order dated 25.7.2014 present at Annexure-10 to the interlocutory application and on the same date the disciplinary authority also proceeds to reject the prayer of the petitioner for regularising the suspension period vide order impugned at Annexure-12 to the interlocutory application. The petitioner feeling aggrieved is before this court.

According to Mr. Pathak learned counsel for the petitioner although work order was issued in the present case on 23.11.2011 and the agreement was entered in between the parties on 30.11.2011 vide



Annexure-5 but the petitioner following the work order had immediately initiated the work on 24.11.2011 and in between the said date and the date of inspection, substantial work had been carried out. He submits that it is for this reason that the Major part of explanation has been accepted by the Engineer- in- Chief acting as the Enquiry Officer as well as the Disciplinary Authority but merely on allegation of delay and in allegedly not achieving the required standard, that a punishment has been imposed in exercise of power vested under Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as 'the Rules').

Mr. Pathak has referred to the explanation submitted by the petitioner in response to the show cause issued by the Disciplinary Authority against the enquiry report present at Annexure-7 to submit that the entire work had to be completed in span of 25 days and the chart given by the petitioner in his reply would show that that the petitioner was not missing on the target rather had achieved more than what was stipulated within the week of the initiation of the work. According to Mr. Pathak the chart followed by the petitioner does not show any laxity on the part of the petitioner. Mr. Pathak has also referred to some file noting placed on record through the interlocutory application to submit that whereas the Disciplinary Authority accepts

the explanation as reflected from the file noting but while acting as a Disciplinary Authority he proceeds to impose penalty which runs counter to his own opinion.

The arguments of Mr. Pathak has been contested by Mr. Singh who while referring to 'the Rules' submits that 'the rules' in question do conceive a situation where a disciplinary authority may act as an Enquiry Officer and for the purpose Mr. Singh, has referred to the provisions underlying Rule 17 and Rule 18 of 'the Rules' which leaves a discretion on the Disciplinary Authority to also act as an Enquiry Officer.

Mr. Singh reverting to the contest on merits submits that although the disciplinary authority acting as the Enquiry Officer has indeed accepted the major part of the explanation but it is on account of laxity shown by the petitioner in not achieving the target which has persuaded the Engineer- in- Chief to impose a minor penalty on the petitioner which order would suffer with no infirmity requiring an interference because it has been passed after giving reasonable opportunity to the petitioner to express himself and it is in consideration of the explanation given by the petitioner.

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



The records show that the allegation has been bifurcated in three parts and while the Engineer in Chief cum Additional Secretary as the Enquiry Officer as well as the punishing authority has accepted two of the three explanations, he has proceeded to penalize the petitioner/on partial upholding of the allegations. In fact it is again a matter of record that the explanation given by the petitioner to the said part has also been upheld though partially and not in its entirety. Meaning thereby, even the Disciplinary Authority is in doubt whether or not the explanation is worthy of rejection. The last two lines in the finding against the third part of the allegation present at Annexure-4 shows that in the opinion of the Engineer in Chief cum Additional Secretary the petitioner could have achieved a better target and that not sufficient effort was put behind by the petitioner to achieve the target. Meaning thereby, in the opinion of the Enquiry Officer as well as the Disciplinary Authority, the petitioner could have performed better.

The issue is whether such expression of a disciplinary authority in respect of a delinquent officer can be construed as a 'misconduct' to invite a punishment, even of a minor character. In my opinion, the answer has to be in the negative. A performance of duty and achieving of target may be a relevant factor to consider a case of an officer for future promotions but that cannot be a ground for inviting a penalty



unless the consequences are abhorrent and is attributable to violation of any statutory prescriptions or a fall out of such lapse is irreversible or the act complained is a disobedience of an order issued by a superior authority or the likes which are reflective of the conduct of the delinquent to consciously flout the settled norms with oblique motives. None of these relevant factors do accompany the opinion of the Disciplinary Authority for imposing the penalty except that the petitioner could have performed better.

The opinion of the Supreme Court recorded in the case of **Union of India Vs. J. Ahmad** since reported in (1979) 2 SCC 286 lays down broad parameters as to the acts which can be construed as a 'misconduct' and a simple reading of the opinion is sufficient to strike down the punishment impugned.

I am tempted to reproduce paragraphs 9 and 11 to the judgment rendered in the case of **J. Ahmad** (supra) and which by itself is sufficient to held that the punishment imposed on the petitioner was not warranted for the act complained of does not fall within the confines of a 'misconduct' to invite a penalty:

“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.

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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 serous 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.”

For the reasons discussed, the order of penalty cannot be upheld and for the same reason the order of the disciplinary authority in rejecting the prayer of the petitioner for regularisation of his services spent under suspension, cannot be upheld.

In result, the order dated order bearing Memo No.2694(E) dated 6.5.2013 passed by the Engineer-in-Chief-cum-Additional Commissioner-cum-Secretary, Road Construction Department, Government of Bihar, Patna, dated 6.5.2013 as impugned at Annexure-8 to the writ petition, the order bearing Memo No. 3314(E) dated 25.7.2014 placed on record vide Annexure-10 whereby the review is rejected together with the order bearing Memo

No.3315(E) dated 25.7.2014 impugned at Annexure 12 to the I.A.No.1739 of 2015 are quashed and set aside. The writ petition is allowed. The consequences shall follow.

(Jyoti Saran, J)

Bibhash/-

AFR/NAFR	
CAV DATE	
Uploading Date	29.10.16
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