

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3015 of 2014

With

I.A. No.1738 of 2015

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Sunil Kumar Suman, son of Sri Ramdeo Paswan, Resident of 302 (A), Maha Lakshmi Apartment, East Boring Canal Road, P.S.- Budha Colony, Patna.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Secretary, Road Construction Department, Bihar, Patna.
3. The Deputy Secretary (Vigilance), Road Construction Department, Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Prabhu Nath Pathak

For the Respondent/s : Mr. Krishna Kant Singh, AC to SC-10

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 09-11-2016

Heard Mr. Prabhu Nath Pathak, learned counsel appearing for the petitioner and Mr. Krishna Kant Singh, learned Assisting Counsel to Standing Counsel No.10 for the State.

With the consent of the parties this matter has been taken up with a view to its final disposal at the stage of admission itself.

The petitioner is an Assistant Engineer in the Road Construction Department and is aggrieved by the notification bearing No.3463(S) dated 2.5.2013 issued under the signature of the Deputy Secretary (Vigilance), Road Construction Department, Government of Bihar, Patna, whereby a punishment of withholding of one increment with non-cumulative effect has been imposed on the petitioner. A copy of such order is impugned at Annexure-7 to

the writ petition.

It is during the pendency of the writ petition that the review petition of the petitioner has been rejected vide notification bearing No.6983(S) dated 25.7.2014 issued under the Signature of Deputy Secretary (Vigilance), Road Construction Department, Government of Bihar, Patna and by a separate notification bearing No.6985(S) dated 25.7.2014 the pay and allowances of the petitioner for the period of suspension has been restricted to the subsistence allowance drawn during the suspension period and which orders have been questioned by the petitioner by filing an interlocutory application bearing I.A. No.1738 of 2015 seeking permission to question the same in the present proceeding Copies of such orders are impugned at Annexures 9 and 11 respectively.

Considering that the nature of relief sought to be included is in continuation of the main relief, the prayer is allowed and the petitioner is permitted to question the notification impugned at Annexure-9 together with the order restricting the pay and allowances for the suspension period to the subsistence allowance impugned at Annexure-11, in the present proceedings itself.

The facts leading to the orders impugned briefly stated is that a surprise inspection was carried out by the Secretary, Road Construction Department on N.H.30-A and when it was found that



the road at Fatuha- Daniyawar in between 0-11 kilometer was not in good condition despite the orders being issued from the headquarters. The Secretary also found that the road at 13 kilometer at Nabichak and at kilometer 14 at Faridpur was in a worst condition. The petitioner holding the post of Assistant Engineer along with other Engineers connected with the work were charged for dereliction in duty and for negligence and were proceeded under rule 3(1) (i) and (ii) of the Bihar Government Servant Conduct Rules, 1976. A disciplinary proceeding was initiated and the order to this effect is impugned at Annexure-1 to the writ petition which also encloses the charge-sheet. The petitioner submitted his explanation present at Annexure-2 explaining the circumstances. The Engineer-in-Chief, Road Construction Department, Bihar, Patna was appointed as the Enquiry Officer who bifurcated the allegations into three parts and while upholding the explanation given by the petitioner on the first and second part of the allegation, the Enquiry Officer upheld the third part of allegation. The Enquiry Officer has held that the petitioner could have performed better in completion of the work.

The Disciplinary Authority in the case of the petitioner is the State Government and while accepting the enquiry report so submitted, the Disciplinary Authority has proceeded to impose the

penalty impugned of withholding of one increment with non-cumulative effect.

Mr. Pathak, learned counsel appearing for the petitioner submits that the allegation impugned herein, was also a subject matter of another writ petition preferred by the Junior Engineer arising from CWJC No.2918 of 2014 (**Abdul Rab vs. The State of Bihar**) and the conclusion drawn by this Court would apply on all fours in the case of the present petitioner who happens to be the Assistant Engineer. He submits that this Court on examination of the issues has held that an allegation of inefficiency or a shortcoming on performance, even if be necessary factors for the purpose of promotion of the delinquent concerned, yet it cannot be held a misconduct, to invite a penalty under the disciplinary rules.

Mr. Krishna Kant Singh, learned State Counsel while contesting the arguments of Mr. Pathak has submitted that the case of the petitioner can be distinguished for the reason that he held a superior post and thus was expected to be careful in performing the work. He however, does not dispute the position that the facts involved in the case of **Abdul Rab** (supra) as well as the present case, arise from the same inspection.

I have heard learned counsel for the parties and I have perused the records. It is undisputed that the inspection in question



carried out by the Secretary, Road Construction Department, was a subject matter in the case of **Abdul Rab** (supra) who held the post of Junior Engineer and the enquiry report so submitted by the Engineer-in-Chief is the same in each of the two cases and which is the foundation for the punishment imposed in either of the two cases. Meaning thereby the foundation for the punishment impugned in the two writ petitions are same. In the circumstances, I need not go into the intricacy of the contest for the opinion recorded by this Court in the case of **Abdul Rab** (supra) would conclusively apply to the case of the petitioner and for the sake of convenience the relevant extract of the judgment is reproduced hereinbelow:

“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 hold 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.”

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.”

The opinion expressed by this Court in the case of **Abdul Rab** (supra) in consideration of the judgment of the Supreme Court passed in the case of **J. Ahmed** (supra) would squarely apply to the present case and are sufficient to hold that the act complained against the petitioner did not constitute a misconduct to invite a punishment under ‘the Rules’.

For the reasons so recorded hereinabove I am unable to

uphold the punishment imposed on the petitioner in the disciplinary proceeding of withholding his increment or restricting his pay and allowances to the subsistence allowance drawn during the suspension period.

In result, the notification bearing No.3463(S) dated 2.5.2013 impugned at Annexure-7, the notification bearing No.6983(S) dated 25.7.2014 impugned at Annexure-9 and the notification bearing No.6985(S) dated 25.7.2014 impugned at Annexure-11, cannot be upheld and are accordingly quashed and set aside.

The writ petition is allowed. The consequences shall follow.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21-11-2016
Transmission Date	NA