

1. Nalin Vilochan S/O Late Foger Hansda Resident of Village- Narhi, P.S- Haveli Kharagpur, District- Munger.

Versus

- Respondent/s

For the Respondent/s : Mr. Manoj Kumar, A.C. to S.C.12

Date: 29-11-2016



Annexure-17 whereby the review petition has been dismissed and which order is impugned at Annexure-18. The third order questioned by the petitioner bearing memo No. 3746(s) dated 10.5.2013 whereby the pay and allowances has been restricted to the subsistence allowance. A copy of the order is impugned at Annexure-18.

Facts of the case briefly stated is that while the petitioner held the post of Assistant Engineer and posted at Road Sub-Division, Jehanabad he was put under suspension vide order dated 28.5.2001 inter alia on charge of not cooperating with enquiry under Rule 49A(1) of the Bihar Government (Classification, Control and Appeal Rules, 1930. A copy of the order of suspension is placed at Annexure-1. The petitioner questioned the suspension order in C.W.J.C. No. 4045 of 2002 and which writ petition was disposed of with direction to the disciplinary authority to conclude the proceeding within four months, failing which the suspension would be revoked. A copy of the order is present at Annexure-2. Since the departmental proceeding was not concluded within four months as stipulated that the petitioner came before this Court in C.W.J.C.No.10062 of 2002 and it is during the pendency of the writ petition that the suspension order was revoked on 26.11.2002. A copy of the order of revocation of suspension is present at Annexure-3 and the writ petition was accordingly disposed of vide Annexure-4. In between, a charge memo



in प्रपत्र (क) was served upon the petitioner appointing one Ashok Kumar Sinha Special Officer- cum- Deputy Secretary, Road Construction Department, Bihar, Patna as Enquiry Officer vide Resolution dated 24.4.2002 present at Annexure-5. The petitioner filed his show cause reply on 5.8.2002 repelling each of the charges together with evidence/documents in support thereof which is enclosed at Annexure-6. The Enquiry Officer vide his report dated 14.11.2002 exonerated the petitioner of all charges present at Annexure-7. The enquiry report was examined at the departmental level by the Secretary, Road Construction Department who agreed with the proposal as apparent from the file noting present at Annexure-8, however, no final order was passed.

It is after a lapse of 7 years since the enquiry report was submitted on 14.11.2002 that a second show cause notice was issued to the petitioner on 22.1.2009, a copy of which is present at Annexure-9. The petitioner questioned the second show cause notice in C.W.J.C.No.15795 of 2009 and which was disposed of by a Bench of this Court vide order passed on 17.12.2009 requiring him to respond to the notice by raising all issues. The petitioner in obedience filed his reply to the second show cause notice denying each of the allegations but which explanation has not been accepted by the disciplinary authority and vide Notification No. 5041(s) dated



29.4.2011, the punishment in question has been imposed, a copy of which order is impugned at Annexure-15. The petitioner feeling aggrieved filed review application vide Annexure-16 and which has also been rejected by the State Government as communicated by the Deputy Secretary (Vigilance) in his order No. 3742(s) dated 10.5.2013 impugned at Annexure-17 and vide notification bearing No. 3746(s) dated 10.5.2013, the pay and allowance of the petitioner for the period under suspension i.e. from the 28.5.2002 to 21.7.2002 was reduced to the subsistence allowance drawn by him, which order is impugned at Annexure-18. The petitioner feeling aggrieved is before this Court.

Mr. Vinod Kumar Kanth, learned Senior counsel has appeared for the petitioner while the State is represented by Mr. Manoj Kumar A.C. to S.C.12.

It is the argument of Mr. Kanth learned Senior counsel with reference to a letter of the District Magistrate, Munger dated 7.6.2001, a copy of which is enclosed at Annexure-13 to the writ petition that the contentions advanced by the petitioner in his reply filed in the disciplinary proceedings, stands vindicated. He submits that the letter is in response to a direction issued by the Secretary of the department for institution of F.I.R. against the officers responsible for excess withdrawal of public money in preparation of forged bills which also



includes the name of the petitioner at Serial No. 2 but the District Magistrate has requested the Secretary, Road Construction Department to reconsider his decision in so far as the petitioner and one Sunil Kumar Gupta is concerned, in the background explained in the reply.

It is the submission of Mr. Kanth that although the petitioner was being proceeded for payment of forged bills of the contractor but the fact is that of the charges leveled against the petitioner, only two bills had been passed by the petitioner under threat of life by the contractor and about which he had immediately informed the District Magistrate who in turn, stopped the payment of the bills and thus no Government money was paid to the contractor. It is the argument of Mr. Kanth that it is in this view of the matter and considering the explanation of the petitioner that the Enquiry Officer had opined in his favour as back as in the year 2002 and even when the file proceeded for necessary orders on the report of the Enquiry Officer, no final order was passed in the proceeding rather it is after a lapse of almost 7 years when disagreement note has been expressed to the opinion of the Enquiry Officer under the signature of the Deputy Secretary (Vigilance) which cannot be termed as 'an order of the State Government', who is the Disciplinary Authority of the petitioner.

With reference to the judgment of the Supreme Court since



reported in **(1998)7SCC 84 (Punjab National Bank & Ors. Vs. Kunj Behari Mishra)** as well as the judgment of the Supreme Court reported in **(1999) 7 SCC 739 (Yoginath D. Bagde vs. State of Maharashtra and Anr.)** he submits that a communication of the notes of disagreement by the disciplinary authority is a mandatory requirement in a disciplinary proceeding and in so far as the present case is concerned, the disagreement note dated 22.1.2009 issued under the signature of the Deputy Secretary(Vigilance), does not satisfy this requirement for it is not a disagreement note issued by the Disciplinary Authority.

Learned counsel has submitted that even on merits the order of the Disciplinary Authority is not sustainable for it is not supported with evidence. With reference to the order of punishment imposed against the petitioner he submits that the order itself is reflective of the mechanical application of mind by the disciplinary authority inasmuch as the order proceeds to impose even such punishment, not provided under the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as 'the Rules'). It is submitted that a posting in non works section, is not one of the punishments provided under 'the Rules' yet the Disciplinary Authority has proceeded to impose such punishment.

The arguments of Mr. Kanth has been contested by Mr. Manoj



Kumar, learned A.C. to S.C. 12 and while defending the order impugned he submits that since there was a siphoning of Government money by clearance of illegal bills of contractors, that the disciplinary proceedings was initiated against the officials responsible and since the petitioner also happens to be a part of fraud hence he has been punished accordingly. It is submitted that the punishment order has been passed after due opportunity of hearing to the petitioner who makes no complaint on the procedural aspect of the matter. According to Mr. Manoj Kumar, since no procedural infirmity is found in the disciplinary proceedings and the disciplinary authority has imposed the punishment in question, in consideration of the materials on record, the order does not suffer from any infirmity. Pursuant to the directions of this Court Mr. Manoj Kumar has also produced the records of the disciplinary proceedings to answer the issue raised by Mr. Kanth that there is no disagreement note by the Disciplinary Authority and the communication of the Deputy Secretary (Vigilance) present at Annexure-9, would not satisfy the requirement. With reference to the documents present in file it is submitted by Mr. Manoj Kumar that there is no infirmity in the decision making process and the disagreement note has been issued on concurrence being given by the departmental Minister.

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



the records.

Even though the allegations leveled against the petitioner as present in the charge memo impugned at Annexure-5 is quite serious, it is to be seen whether the explanation to the allegations, can be upheld in the background of the evidence on record. The charge memo contains three charges namely;

- (i) Charge No.1 relates to payment of bill to the contractor in respect of construction of the Makhdumpur- Barabar Path at 0 to 3 kilometers falling under Road Division No. 1 Jehanabad. According to the charge, payment of Rs. 10,68,800/- has been made by the petitioner though, neither the measurement took book was presented to the enquiry team nor the petitioner was present before the team.
- (ii) Charge No. 2, relates to construction of Makhdumpur- Barabar Path at 4, 5 and 6 kilometers and the petitioner has been charged with making illegal payment to the contractor to the tune of Rs. 13,94,961/-; and
- (iii) Charge No.3, relates to the widening of the Arwal- Jehanabad road and in respect of which a charge of making payment of Rs. 20,21,471/- has been made on the



petitioner against forged bills.

The reply of the petitioner is at Annexure-6 and in response to charge No. (1), the petitioner has stated that whereas the bill presented by the contractor does not bear his signature, no information was received by him for being present for spot inspection. The petitioner has thus repelled the charge as based on no evidence.

In response to the charge No. (ii), it is stated that his signature was obtained on the bill by the contractor by resorting to criminal acts and about which he had immediately informed the District Magistrate, Jehanabad which is confirmed by the letter of the District Magistrate dated 7.6.2001 addressed to the Secretary, Road Construction Department (Annexure-13).

While responding to the Charge No.(iii) he has again mentioned that his signature was obtained by anti social elements by applying pressure but information was given to the District Magistrate, Jahanabad in this regard and which is confirmed from the letter bearing No. 1157 dated 28.7.2001 of the District Magistrate(Annexure-14).

The enquiry report submitted by the Enquiry Officer is present at Annexure-7. The Enquiry Officer has rejected the charge against the petitioner of not being present before the enquiry team on grounds of absence of communication. In so far as the charge of making



payment of the bills to the tune of Rs. 10,68,800/- is concerned, the Enquiry Officer has accepted the stand of the petitioner regarding absence of his signature on the bill of the contractor.

In so far as the charge No.(ii) regarding payment of Rs. 13,94,961/- is concerned, the stand of the petitioner of forceful signature on the bills and its communication to the District Magistrate, Jehanabad has been considered by the Enquiry Officer in reference to the letter No.914 dated 7.6.2001 of the District Magistrate, Jehanabad addressed to the Secretary to hold, that it is on the information given by the petitioner himself that the enquiry had been initiated into the matter.

The stand of the petitioner against the allegation No. (iii) regarding forceful signature by the anti social elements on the bill relating to the widening of the Arwal- Jehanabad road has also been accepted by the Enquiry Officer in consideration of the letter No. 1157 dated 28.7.2001 of the District Magistrate, Jahanabad addressed to the Secretary, Road Construction Department. The Enquiry Officer- cum- Special Officer- cum- Deputy Secretary, Road Construction Department has thus recommended for dropping the proceedings in absence of evidence to prove the charges.

Even when the report was submitted on 14.11.2002 and the file was processed in the light of the recommendation made by the



Enquiry Officer no final decision was taken thereon and it is after a lapse of almost 7 years that a disagreement note was issued under the signature of the Deputy Secretary, Vigilance present at Annexure-9 on 22.1.2009. The disagreement note not only disagrees on the finding given by the Enquiry Officer on the three charges levelled against the petitioner vide the chargesheet present at Annexure-5 but also enlarges the scope of the enquiry to include a 4th charge relatable to Jehanabad- Ekangar Sarai Road involving a payment of Rs.1,82,593/- which charge does not form part of charge memo rather is an addition thereto.

The petitioner again responding to the disagreement note has individually answered the charges to clarify the position vide his reply dated 3.2.2010 at Annexure-12 but which has not satisfied the respondents to result in the punishment order.

In my opinion, the disagreement note impugned at Annexure-9 dated 22.1.2009 travels beyond the charge memo. The proceeding in question was initiated on charge of making illegal payment to the contractors as confirmed in the charge memo impugned at Annexure-5. The disagreement note relies upon the investigation in a police case arising from Jehanabad P.S. Case No. 245 of 2001 to hold the petitioner guilty of criminal conspiracy in passage of bills of contractor. It would be necessary to mention here that the institution



of a criminal case is an event which took place subsequent to the framing of the charge memo impugned at Annexure-5 and is certainly not the foundation therefor. Thus it was wholly illegal on the part of the Deputy Secretary (Vigilance), to have processed the disagreement note relying upon the police case which is not the foundation for the disciplinary proceeding.

Even though the records of the proceeding produced by Mr. Manoj Kumar learned State counsel does confirm that the disagreement note and service of second show cause was issued after seeking approval of the Principal Secretary and the Minister concerned, but the very fact that the disagreement note relies upon the police case to express an opinion contrary to the conclusion of the Enquiry Officer, the foundation itself is illegal because the police case was never a foundation for the charge memo served on the petitioner in the disciplinary proceeding.

Normally, such situation would call for a remand of the matter to the disciplinary authority to apply his mind, before issuing a disagreement note but considering the material on record, I am satisfied that the proceeding is not sustainable even on merits. In fact even the figures mentioned in the disagreement note at Annexure-9 are at variance with the figures mentioned in the charge memo present at Annexure-5 except the figure relating to Jehanabad Arwal widening



work. The disagreement note also enthusiastically includes a 4th charge relating to Jahanabad- Ekangarsarai road which again renders it illegal as the scope of enquiry cannot be enlarged at that stage.

Reverting to the charge levelled against the petitioner, while it is the specific case of the petitioner that he was not a signatory to the bill passed in relation to Makhdumpur- Barabar Path at 0 to 3 kilometers which is the charge No.1, the contention has not been disputed. In so far as the allegation at charge Nos. 2 and 3 relating to Makhdumpur- Barabar Path at 4, 5 and 6 kilometers and widening of Arwal- Jehanabad Path respectively is concerned, it is the specific case of the petitioner that although he was forced to sign on the bills but he immediately communicated the position to the District Magistrate, Jehanabad and whereafter the payment has been stopped and which fact is confirmed from the letter of the District Magistrate, Jahanabad dated 7.6.2001 annexed at Annexure-13 and dated 24.7.2001 annexed at Annexure-14 addressed to the Secretary, Road Construction Department. The District Magistrate while raising objections against proposal of the department to institute criminal case against the petitioner and one Sunil Kumar Gupta, has specifically stated that it is on the information received from these persons that the payments were not made and for which, the contractors have been issuing life threat to these persons.



In the circumstances discussed, this Court is at a loss to appreciate as to the foundation for continuation of the disciplinary proceeding against the petitioner. In my opinion the foundations are completely lacking. Of the three charges, while the petitioner is not a signatory of the bill mentioned at Charge No.1, in so far as the bills at Serial Nos. 2 and 3 are concerned, the payments were stopped on the complaint of the petitioner by the District Magistrate, Jehanabad. The records produced by Mr. Manoj Kumar shows that despite the protest made by the District Magistrate, Jehanabad on the institution of criminal case against the petitioner and one other, the criminal case has been instituted accusing the petitioner of criminal conspiracy in the passage of bills and such institution ipso facto has been made a foundation for the disagreement note and imposition of penalty. It is rather weird that despite the finding recorded by the Enquiry Officer exonerating the petitioner of all charges and despite the recommendation of the District Magistrate, Jehanabad that it is on the information of the petitioner and one Sunil Kumar Gupta that the payments were stopped to the contractor and despite the evidence supporting the explanation of the petitioner yet a whimsical disagreement note stands issued at Annexure-9 to culminate into an order of punishment vide Annexure-15 which mechanically endorses the said view.



In my considered opinion, an act simplicitor of a Government servant facing disciplinary proceeding cannot be held a misconduct unless the act is objective, backed with motivated action and the consequences are disastrous. There is complete absence of evidence to attribute a misconduct in the action of the petitioner. In fact the evidence is to the contrary and it is the timely action of the petitioner that the payment could be stopped. The agreement note impugned at Annexure-9 as well as the punishment order at Annexure-15 upholding the charge of misconduct, have been mechanically passed and the opinion recorded therein, runs contrary to the facts available on record.

In result, the order bearing Notification No. 5041 dated 29.4.2011 of the State Government whereby the petitioner has been visited with the punishment, cannot be upheld and is accordingly quashed and set aside. The writ petition is allowed. The consequences shall follow.

Let the records of the disciplinary proceeding so produced by Mr. Manoj Kumar, learned A.C. to S.C.12 be returned.

Bibhash/-

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CAV DATE	
Uploading Date	13.12.16
Transmission Date	

(Jyoti Saran, J.)

