

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.296 of 2011

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1. Gangeshwar Prasad Sharma S/O Late Sadhu Saran Singh Resident of Mohalla Lakhibagh, Police Station Muffasil (Manpur), District Gaya.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary, Department of Road Construction Bihar, Patna.
3. The Engineer in Chief cum Special Secretary cum Additional Commissioner Department of Road Construction Bihar, Patna.
4. The Joint Secretary Department of Road Construction Bihar, Patna.
5. The Deputy Secretary (Vigilance) Department of Road Construction Bihar, Patna.
6. S.P. Keshwari, Departmental Enquiry Commissioner Personnel and Administrative Reform Department Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Sanjay Kumar, Adv.

For the Respondent/s : Mr. Ujjwal Kumar Sinha, A.C. to AAG 3

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 26-07-2016

Heard Mr. Sanjay Kumar, learned counsel for the petitioner and

Mr. Ujjwal Kumar Sinha, learned A.C. to AAG 3 for the State.

With the consent of the parties, the matter has been taken for final disposal at the stage of admission itself.

The petitioner is aggrieved by the order bearing Memo No.9610(S) dated 30.6.2010 whereby the petitioner has been imposed a penalty of forfeiture of 10% of his pension by the State Government in exercise of power vested under Rule 43(b) of the Bihar Pension Rules 1950 (hereinafter referred to as 'the Rules'). Although learned counsel for the parties do inform that there is an alternative remedy by



way of review available to the petitioner but considering that this matter has remained pending before this Court for the last 5 years, this Court instead of relegating the petitioner to avail the alternative remedy, is of the considered view that since the matter relates to a forfeiture of pension hence the matter can be taken up for consideration on its own merits waiving any objection as to the alternative remedy available.

Facts briefly stated is that the petitioner was holding the post of Executive Engineer, Road Construction Division, Nawada when charges were framed against him vide charge memo dated 22.10.2005 levelling no less than 9 charges on different counts. It would not be necessary for me to discuss the charges individually rather summarily, the charges related to the failed supervision of the petitioner in relation to different contract works. An enquiry was held and the Enquiry Officer submitted his report present at Annexure-2 on 24.6.2009. The Enquiry Officer while exonerating the petitioner of the rest charges, has partially upheld the charge nos. 2 and 4 against the petitioner while the charge no. 6 has been upheld in its entirety. In between, the petitioner has superannuated on 31.5.2008 and thus a decision was taken to convert the disciplinary proceedings under Rule 43(b) of 'the Rules'. The petitioner was served with a second show cause against the proposed penalty and which was responded to vide Annexure-3 by the petitioner clarifying the position. The State

Government in its Road Construction Department vide notification bearing Memo No.9609 dated 30.6.2010 has on consideration of the enquiry report and the reply filed by the petitioner, chosen to impose penalty of forfeiture of 10% of the pension and which decision has the approval of the Bihar Public Service Commission. The petitioner feeling aggrieved, is before this Court.

While it is the argument of Mr. Sanjay Kumar appearing for the petitioner that the charges are based on no evidence, it is the argument of Mr. Sinha learned State counsel that the charges are based on records and which is sufficient evidence of the dereliction of duties by the petitioner causing negligence.

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

As I have observed, the charges relate to execution of different contracts during the period January to March 1999 and of the 9 charges framed while 6 charges were not found proved, of the remaining three charges whereas charge no.2 and 4 were found to be partially upheld, the charge no. 6 has been upheld. I would thus be restricting my discussion on these 3 charges as framed at Annexure-1.

Charge No.2 relates to the construction of Gaya-Nawada Road at KM 32 to 34 (part) following the Agreement No.30F-2 of 1996-97 and 3F-2 of 1997-98. The petitioner has been charged of making payment to the contractor despite his failure to carry out quality work

in a regular manner.

Charge no.4 relates to the Gaya-Nawada Road at K.M. 38(part) to 44(part) following Agreement 3F-2 of 1997-98 and in which it has been stated that the petitioner has made payments without carrying out measurement and without noticing that the period for execution of work had lapsed.

Charge No.6 relates to the Gaya -Tungi-Hisua road at 32(part) to 44 K.M. in respect of its widening and soldering and for which the petitioner has been charged with making payment to the contractor without penalizing him for not having constructed the road within the time frame.

As I have mentioned above, whereas Charge Nos.2 and 4 were partially proved, charge no.6 was proved in its entirety. The issue is whether these charges would amount to misconduct and would be sufficient for continuation of the proceedings under Rule 43(b) of 'the Rules'. It is not in every case that a departmental proceeding which remains inconclusive on the date of superannuation of the delinquent, is as a matter of routine, continued post retirement rather there are certain pre-conditions attached for its continuation and which is fully discussed in rule 43(b) of 'the rules' which reads thus:

“43(b) The State Government further reserve to themselves the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government if the pensioner is found in departmental or judicial proceeding to

have been guilty of grave misconduct; or to have caused pecuniary loss to Government by misconduct or negligence, during his service including service rendered on re-employment after retirement:

Provided that-.....”

A plain reading of ‘the rule’ in question would reflect that though a right is reserved in the State Government to continue a proceedings post retirement of a delinquent but the area is also clearly demarcated and it is only where the delinquent is charged for grave misconduct or has been charged with causing pecuniary loss to the Government by his misconduct and negligence that any decision to continue the proceedings for forfeiture of pension, can be continued.

In so far as the case of the petitioner is concerned, a plain reading of the charge nos. 2, 4 and 6 which are subject matter of penalty, would demonstrate that the petitioner is held responsible for not having discharged his duties diligently and was found wanting on his supervisory role in the execution of the contracts in question. The issue would be whether an inefficient approach by the petitioner in supervising over the work in question, would ipso facto amount to a ‘misconduct’ and whether in absence of any charge on the petitioner of having made payment in a situation where it was not required to be made resulting in pecuniary loss to the Government, would the proceedings yet required a continuation after superannuation.

Although misconduct has not been defined in the service rules



but then it does not require a deep rooted discussion to hold that the charges leveled against the petitioner would certainly not fall within the ambit of a misconduct even if the petitioner was found wanting in a strict adherence to his supervisory role. That every act of negligence would not constitute a 'misconduct' finds discussed in the judgment of the Supreme Court in the case of **Union of India Vs. J. Ahmad** since reported in (1979) 2 SCC 286.

For expressing my opinion on the issue, I deem it necessary to reproduce the charges which fell for consideration before the Apex Court in the judgment rendered in the case of **J. Ahmad** (supra) together with the conclusions drawn, which runs thus:

“7. To appreciate the contention it is better to have a look at the charges framed against the respondent. They are as under:

- (i) Completely failed to take any effective preventive measures against widespread disturbances breaking out in Nowgong District in spite of adequate warning being conveyed;
- (ii) Showed complete lack of leadership when the disturbances actually did break out and failed to give proper direction to your subordinate Magistrates and co-ordinate co-operations with the police to restore law and order;
- (iii) Did not personally visit the scenes of disturbances within the town or in the rural areas, in time to take personal control of the situation and to exercise necessary supervision;
- (iv) Did not keep Government informed of the actual picture and extent of the disturbances;
- (v) Showed complete ineptitude, lack of foresight, lack of firmness and capacity to take quick and firm decision and were, thus largely responsible for complete breakdown of Law and Order in Nowgong town as well as the rural areas of Nowgong District.”

The Supreme Court on examination of the charges held as follows in paragraph 9 :

“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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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 stationary 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 receive 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.”

Considering the case of the petitioner in the backdrop of the clear enunciation of law on the issue of ‘misconduct’ it is clear beyond any shadow of doubt that the charges upheld, which are the foundation for the impugned punishment, neither would constitute a ‘misconduct’ nor does it reflect that any financial loss was caused to the State, by the acts of the petitioner in question.

In my opinion, in the circumstances discussed, there was no occasion for the continuation of the proceedings post retirement of the petitioner, which was unwarranted and the impugned punishment is only a perpetuation of the illegality.

In result, the imposition of penalty on the petitioner in the form of forfeiture of pension @ 10% vide notification bearing No.9610 dated 30.6.2010 of the State Government cannot be upheld and is accordingly set aside.

The writ petition is allowed. The consequences shall follow.

(Jyoti Saran, J)

Bibhash/-

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CAV DATE	
Uploading Date	16-8-16
Transmission Date	