

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.6849 of 2016

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1. Shankar Prasad Singh son of Late Ram Bachan Singh, resident of At & P.O. & P.S. Keshari Nagar, Ajanta Colony, District- Patna-24.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Secretary, Rural Works Department, Government of Bihar, Patna.
3. The Engineer-in-Chief, Rural Works Department, Government of Bihar, Patna.
4. The Joint Secretary, Rural Works Department, Government of Bihar, Patna.
5. The Deputy Secretary, Department of Road Construction, Govt. of Bihar, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Rajiv Kumar Verma, Sr. Adv.
 Mr. Tuhin Shankar

For the Respondent/s : Mr. Anant Prasad Singh, S.C.15
 Mr. Sanjay Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

C.A.V. JUDGMENT

Date: 30-11-2016

The petitioner prays for quashing of the order bearing Memo No. 91 dated 6.1.2016 issued under the signature of the Joint Secretary, Rural Works Department, Government of Bihar, whereby the petitioner has been imposed the following penalties:

- (i) Censure for the year 2007-08.
- (ii) Withholding of two annual increments with non-cumulative effect,

A copy of the order is impugned at Annexure-1 to the writ petition.

The disciplinary proceedings in question was initiated against



the petitioner for deficient quality of work in the matter of construction of a road under the Mukhiya Mantri Gramin Sarak Yojana running in between the Middle School Khorampur to Bilat Chouk in the district of Muzaffarpur.

Some undisputed facts connected with the matter in contest is that the work in question was allotted to the contractor M/s Maruti Enterprises, Gudri Road, Hajipur and was to commence on 15.3.2007 with its date of completion fixed on 14.9.2007. Such fact is manifest from the on spot enquiry report present at Annexure-2 which was conducted on a complaint received from the villagers, a copy of which has been placed on record vide Annexure-20 to the third supplementary affidavit filed on behalf of the petitioner on 20.8.2016. The on spot enquiry into the complaint was conducted by the Executive Engineer, Works Division, Hajipur, the Executive Engineer, Soil Division Muzaffarpur and the Superintending Engineer, Work Circle, Muzaffarpur. The substance of the finding of the enquiry so conducted is, that while the seal coat was found to have an average thickness of 16 MM, the thickness of the metal work was found to be 144 mili meters as against the required thickness of 150 mm and at some places as low as 134 mm, 112 mm and 131 mm. The petitioner was put to notice on 9.8.2008 vide Annexure-3 series enclosing a memo of charge to such effect and which was responded



to by the petitioner vide Annexure-4 on 25.8.2011, explaining the discrepancy so found in the thickness of the seal coat as well as the metal work carried out. Not being satisfied, that the disciplinary authority who in the present case is the State Government in its Rural Works Department entrusted the enquiry to the Commissioner of Departmental Enquiry and one Gopal Narain Singh, Deputy Secretary, Rural Works was appointed as a Presenting Officer vide resolution dated 27.2.2007 present at Annexure-5. The Enquiry report submitted by the Commissioner, Departmental enquiry is placed at Annexure-6 upholding the charge. The petitioner was put to second notice enclosing the copy of the enquiry report vide letter dated 27.1.2015 of the Joint Secretary present at Annexure-7. The petitioner filed an exhaustive reply to the enquiry report on 11.2.2015 vide Annexure-8 and requested for a fresh enquiry through a technical hand. The request of the petitioner was accepted and an enquiry under the Chief Engineer was again conducted on the allegations, the report of which forms the part of Annexure-15 series present at running page 150. The Chief Engineer while accepting the explanation given by the petitioner on the discrepancy in the thickness of the seal coat as well as thickness of the metal work, has recommended for dropping the proceeding which recommendation has been accepted not only by the Secretary of the Department but also the Departmental Minister as



manifest from running page 152. Since the petitioner happens to be a Gazetted Officer, hence the matter reached the Chief minister for his opinion and in between the Chief Secretary opined against the dropping of the proceedings and instead recommended for punishment of censure and withholding of two annual increments with non cumulative effect vide Annexure-17 on 26.10.2015 which has been endorsed by the Chief Minister on 27.10.2015 vide Annexure-17 and the consequential order passed is impugned at Annexure-1, vide Notification bearing memo No. 91 dated 6.1.2016. The petitioner feeling aggrieved is before this Court.

I have heard Mr. Rajeev Kumar Verma, learned Senior counsel appearing for the petitioner along with Mr. Tuhin Shankar and Mr. Anant Prasad Singh S.C.15 for the State who appears along with his Assisting Counsel Mr. Sanjay Kumar .

While it is the argument of Mr. Verma, learned Senior counsel that the delay in holding of the enquiry itself becomes a relevant factor for consideration of the issue in contest, since it is the work quality which is being assessed on the basis of a enquiry report which is submitted after a lapse of three years of the completion of work and even after the successor in the office of the Executive Engineer had certified the work for final payment. Learned counsel also questions the proceedings on its merits in view of the opinion expressed by the



Chief Engineer being a technical hand, which runs counter to the opinion expressed by the Commissioner of Enquiry. According to Mr. Verma, while the on spot enquiry itself was not carried out in tune with the advisory issued by the Road Construction Department bearing Memo No. 1389 dated 16.9.1994 which fact is also admitted by the technical experts, it is also his arguments that the delay in carrying out enquiry is also a reason for distorted report on the thickness of the seal coat work as well as the metal work carried out. It is further the argument of Mr. Verma that the petitioner has been singled out in the process for even when his successor in the office of the Executive Engineer has satisfied himself before recommending for final payment to the contractor which has accordingly been done, yet the petitioner has been found wanting in ensuring the quality work and has been punished for alleged lapse. It is further the argument of Mr. Verma that in view of the fact that the explanation of the petitioner has been accepted not only by the Chief Engineer but also the Departmental Secretary and the Minister then before the Chief Secretary could express disagreement on such recommendation, the petitioner was entitled to a notice in terms of Section 18(2) of the Bihar Government Servant (Classification, Control and Appeal) Rules 2005 (hereinafter referred as 'the Rules') and the Chief Secretary could not have ignored the subsequent developments which took place



on the request so made by the petitioner.

Another issue which has been raised by Mr. Verma is with reference to the provisions of Rule 32(a) of 'the Rules of Executive Business to submit that it is only in cases where a proposal is mooted recommending punishment, that any jurisdiction can be exercised by the Chief Secretary but since in the present case there is no such recommendation rather the recommendation is for dropping of the proceedings hence the Chief Secretary has exceeded his jurisdiction to differ there from and to recommend for imposition of punishment.

The argument of Mr. Verma has been contested by Mr. Anant Prasad Singh to submit that the petitioner holding the post of Executive Engineer at the relevant time, he was expected to ensure the quality of the road and since the on spot enquiry has reported a deficiency in the thickness of the seal coat as well as the metal work, the petitioner would have to face the consequence. It is submitted that there being no procedural lapse in the departmental enquiry and the petitioner having been granted due opportunity to vindicate his stand, the Disciplinary Authority in consideration of the enquiry report submitted by the Commissioner of Enquiries, on the basis of the facts and evidence on record, there is no requirement for interference therewith because neither there is any procedural lapse in the holding of the enquiry nor the opinion of the disciplinary authority is perverse



requiring any interference. Explaining the delay, he submits that the payment of 9th bill was made somewhere in January, 2009 and which confirms that the work was yet being carried out and thus there was no extra ordinary delay in holding an enquiry into the work which was carried out until 2010.

In so far as the exercise of jurisdiction by the Chief Secretary is concerned, he submits that the disciplinary authority in the present case is the State Government and thus it is the final decision of the State Government which is valid. According to learned State counsel the rest of the opinions including that of the Departmental Minister become mere recommendations which may or may not be accepted by the disciplinary authority in imposing punishment. He submits that even if there were recommendations by the departmental officers as well as the Departmental Ministers to drop the proceedings, if the Chief Minister has decided to accept the enquiry report submitted by the Commissioner, Departmental Enquiry for imposition of the punishment impugned, the same would suffer no infirmity to require any interference.

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

The facts are not in dispute. The road in question was constructed under the Mukhya Mantri Gramin Sarak Yojana. On a



complaint made by the villagers, a spot enquiry was carried out by a three member technical team who reported a deficiency in the thickness of the seal coat as well as the metal work. Now while there is not much of a discrepancy in the quality maintained in so far as the seal coat is concerned, in so far as the metal work is concerned, at some places the thickness has gone down to almost 11 mm. It is not in dispute that although the work was initiated in the year 2007 and a complaint was also received in the same year vide Annexure-20 to the third supplementary affidavit, it was acted upon after a lapse of three years in the year 2010 as is manifest from the three member enquiry report present at Annexure-2. While the three member technical team did report that the thickness of the seal coat as well as the metal work in the two stretches on the road in question, were found wanting as against the required thickness, the explanation given by the petitioner is that the spot enquiry was not carried out in tune with the departmental circular dated 16.9.1994 present at Annexure-10 and the guidelines issued by the Engineer in Chief on 29.7.2009 present at Annexure-11. The stand of the petitioner has been accepted by the technical hands of the departments which is confirmed from the file noting present with the second supplementary affidavit at Annexure-15 series culminating ultimately in the report of the Chief Engineer No.4 who has accepted that the sags and the depressions in



the road are acceptable considering time lag. The opinion of the Chief Engineer has been taken note of by the Joint Secretary, whose report is present at page 150 and who has opined for dropping of a proceedings considering the circumstances accompanying the allegation. The opinion of the Joint Secretary is accepted by the Departmental Secretary as well as the Departmental Minister. Now even when these technical hands have recorded an opinion which does not go along side the opinion expressed by the Commissioner of Enquiry and even when the Chief Secretary apparently while recommending for punishment has decided to accept the report of the Commissioner, Departmental Enquiry but the reasons are missing.

The records as it stands is that there are two enquiry reports, one by the Commissioner of Departmental Enquiry who is a non technical hand and who proceeds to uphold the guilt, the other is by the Chief Engineer who: (a) upon examination of the departmental circulars issued on the subject matter of holding enquiry into the construction quality of the road; (b) the time lag between date of construction and the spot enquiry held; (c) the circumstances that final payments were made to the contractor by the successor in office of the Executive Engineer upon verification of factual position; and (d) the explanation of the petitioner, recommended for dropping of the proceedings. There can be no dispute on the fact that had the enquiry



been carried out soon after the work was carried out by the contractor, perhaps the petitioner would have to face the consequences but such is not the case here and the road construction quality is being tested on an enquiry held after a lapse of three years. Rightly so the Chief Engineer and the other technical hands have accepted that due to normal wear and tear in the road over a period of almost 3 years, the sags and depressions have occurred and which would be a normal feature and would require a routine maintenance.

The sum and substance of the charge against the petitioner is that he while being incharge of the execution of the work in question holding the post of Executive Engineer has not taken sufficient steps to ensure the quality in the road construction work. In fact except for the alleged deficient thickness of the pre-mixing carpet as well as the metal work, there is no allegation against the petitioner of either financial irregularity in the matter or of extending benefits to the contractor. Meaning thereby there is no allegation casting aspersions on his integrity. In my opinion, the charges even if accepted on its face value reports negligence on the part of the petitioner in ensuring a quality work and nothing beyond. An act of inefficiency or negligence in performance, even if relevant for future prospects of a delinquent, certainly cannot be construed a 'misconduct' unless its consequences are disastrous, irreversible and impinges on his integrity. There is no



such allegation against the petitioner.

In this context, I am tempted to reproduce paragraphs 9 and 11 of the judgment rendered by the Supreme Court in the case of **Union of India versus J. Ahmad** reported in (1979) 2 SCC 286 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.

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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 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.”

An additional factor in the present case, is that even when the Chief Minister has chosen to differ with the recommendations made by the technical heads present at Annexure-15 series while endorsing



the opinion expressed by the Chief Secretary at Annexure-17 but none has bothered to express any reason as to the disagreement with the opinion of the technical hands. In my opinion the finding of the Commissioner, Departmental Enquiry cannot be read in isolation rather once the request of the petitioner for examination of the matter by the technical heads, has been accepted and who have opined in favour of the petitioner in reference to the practical aspects of the matter and the guidelines on the issue, then the said opinion has to be tested accordingly and in the backdrop of the fact that the foundation for the allegations, was resting on an enquiry carried out after a lapse of three years, since road was constructed and during which time the road in question was in continuous usage.

Last but not the least important aspect of the matter is the fact that final payment was made to the contractor for the work in question by the successor in the office of the Executive Engineer after satisfying himself and without raising any objections. Apparently, the allegations even if casting a suspicion on the quality work, the time lag in the report is sufficient to doubt the veracity of the allegations and in my considered opinion the allegation which is founded on a suspicion and has a doubtful foundation, cannot be a subject matter of a disciplinary proceedings muchless a foundation for the impugned order.



In result, the order of the disciplinary authority bearing memo no. 91 dated 6.1.2016 issued under the signature of the Joint Secretary, cannot be upheld and is accordingly quashed and set aside. The writ petition is allowed.

The consequences shall follow.

(Jyoti Saran, J)

Bibhash/-

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CAV DATE	
Uploading Date	3.12.16
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