IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2901 of 2014

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1. Ram Binay Sharma S/O Shiv Deni Singh Resident of Village - Bhagwatipur, P.S. - Karpi, Distt, Arwal

.... Petitioner/s

Versus

1. The Municipal Commissioner, Patna Municipal Corporation, Maurya Lok, C-Block, Budh Marg, Patna
2. The Addl. Municipal Commissioner (Establishment) Patna Municipal Corporation, C-Block Maurya Lok, Budh Marg, Patna
3. The Account and Finance Officer, Patna Municipal Corporation, Maurya Lok C-Block, Budh Marg, Patna

.... Respondent/s

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Appearance :
For the Petitioner/s : Mr. Vijay Kumar Singh, Adv.
For the Respondent/s : Mr. Sanjay Prakash Verma, Adv.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
ORAL JUDGMENT
Date: 26-10-2016

None appears on behalf of the petitioner.

I have heard Mr. Sanjay Prakash Verma learned counsel for the Corporation and I have perused the records.

The petitioner is aggrieved by the order bearing Memo No. 2467 dated 25.6.2011 of the Municipal Corporation impugned at Annexure-4 whereby the petitioner has been visited with the punishment of stoppage of three annual increments with non cumulative effect under the provisions of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as 'the Rules').

The show cause is present at Annexure-1 and charges the petitioner of being absent from his seat at 5.30 P.M. on 24.6.2011.

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According to the Town Commissioner, this act of the petitioner reflects negligence. A show cause was asked which was duly replied by the petitioner vide Annexure-2 explaining the reasons for his absence. The explanation was rejected on grounds that it was not supported with evidence and the punishment order was passed on 25.6.2011 vide Memo No.2467 impugned at Annexure-4. The petitioner approached the Town Commissioner with his representation dated 30.6.2011 enclosing the evidence supportive of his absence. He mentions that since the show cause did not require the explanation to be supported with evidence that the evidence was not enclosed and which is accordingly enclosed with his representation. Since nothing happened and the punishment has taken its effect that the petitioner is before this court.

Pursuant to the order of this Court, a counter affidavit has been filed today reiterating the position reflecting from the chargesheet. The counter affidavit however conveniently ignores the explanation given by the petitioner in his representation dated 30.6.2011 present at Annexure-5 explaining the reasons for his absence.

Having heard Mr. Verma learned counsel for the Corporation and having considered the materials on record, it would not detain this Court any further to hold that the act complained of in the show cause would in no circumstance be construed as a 'misconduct' to invite a penalty under the disciplinary rules. There is nothing on record to show that the petitioner was required to be present at 5.30 P.M. in the office or any advisory issued to such effect which has been disobeyed by the petitioner inviting proceeding.

The term 'misconduct' and what broadly would constitute a 'misconduct' stands discussed in a judgment of the Supreme Court rendered in the case of **Union of India Vs. J. Ahmad** reported in **(1979) 2SCC 286**, and it is held that not every act of a delinquent which may appear negligent or may suffer from error of judgment and thus not to the liking of the disciplinary authority, yet cannot be construed as a misconduct unless the consequences directly attributable to such negligence is rather heavy irreparable and irreversible.

Para 9 and 11 of the judgment reads as under:

> "**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."

As I have said there is nothing on record which would show that the petitioner disobeyed the orders of the Commissioner rather he was found missing from his seat. The explanation given by the petitioner for his absence at 5.30 P.M. on 24.6.2011 vide at Annexure-5, has not been contested nor rejected.

In the circumstances discussed, the order imposing penalty is a mechanical exercise and is not supported by valid reasons

In result, the order bearing Memo No. 2467 dated 25.6.2011 of the Municipal Commissioner impugned at Annexure-4 cannot be upheld and is accordingly set aside. The writ petition is allowed. The consequence shall follow in the form of refund of the amount of increments withheld, which refund be effected within a period of three months from today.

(Jyoti Saran, J)

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AFR	
CAV DATE	
Uploading Date	29.10.16
Transmission Date	