

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5985 of 2016

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Bhikhari, son of Late Ram Prasad Ram, Ex-Track Man, now working as Track Man Grade- II, under senior Section Engineer (P.Way), East Central Railway, Buxar, (Bihar), Resident of Nai Bazar, Ward No. 6, P.S.- Buxar, District- Buxar (Bihar)

.... Petitioner

Versus

1. The Union of India through the General Manager, East Central Railway, Hajipur, District- Vaishali (Bihar)
2. The Principle Chief Engineer, East Central Railway, Hajipur, District- Vaishali (Bihar)
3. The General Manager (Personnel), East Central Railway, Hajipur, District- Vaishali (Bihar)
4. The Divisional Railway Manager, East Central Railway, Danapur, P.O.- Khagaul, District- Patna (Bihar)
5. The Additional Divisional Railway Manager, East Central Railway, Danapur, P.O.- Khagaul, District- Patna (Bihar)

.... Respondents

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Appearance :

For the Petitioner	:	Mr. M.P. Dixit, Advocate Mr. S.K. Dixit, Advocate Mr. Sanjay Kr. Choubey, Advocate Mr. Shailendra Kumar, Advocate Mr. Sunil Kumar, Advocate
For the Railway	:	Mr. Ashok Kumar Keshari, Advocate Mr. (Dr.) Anand Kumar, Advocate Mr. Pramod Kumar Prasad, Advocate

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CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI

and

HONOURABLE JUSTICE SMT. NILU AGRAWAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI)

Date: 23-01-2017

Heard counsel for the petitioner and counsel for the
East Central Railway.

Part of the order dated 08.05.2015, passed in O.A.

No. 991/2012 by Central Administrative Tribunal, Patna Bench,



Patna is being assailed by the petitioner. The portion, which is under challenge, relates to refusal of the Tribunal to pay to the petitioner salary and other remuneration for the period 21.05.2012 to 31.05.2015.

Petitioner was a Track Man. On the unfortunate day, he was entrusted with the duty of a Gate Man. While he was working as a Gate Man at Gate No. 74, on 06.01.2012 at around 8.35 A.M., some persons including the driver of a tractor forcibly snatched the key from the petitioner, opened the railway track gate and while the tractor tried to pass through railway line an accident happened with Simanchal Express which resulted in death of two persons.

Petitioner was placed under suspension on 06.01.2012. Enquiry was held and a major penalty of removal after the enquiry was passed against him.

This order came to be challenged before the Central Administrative Tribunal. The Tribunal's finding in paragraphs 5 and 6 are of importance since it formed the basis for setting aside the order of removal and reinstatement of the petitioner. Therefore, they are reproduced hereinbelow for ready reference :

5. Since soon after entry of the tractor, the Express Train collided, the ground reality must not be forgotten that there must be no breathing



space left in between opening of the gate and collusion. It cannot be visualized that the tractor driver took considerable time to approach the Railway track giving space for the Gateman to inform the Station Master about forcible opening of the barrier gate. At that juncture, the Gateman must be more involved physically and mentally to prevent intruders than informing the Station Master. Since things must have happened in quick succession and rather due to high handed action of hooligans, the poor Gateman could have been only a helpless spectator and since the tractor driver contributed to the accident and for such contributory negligence of the tractor driver, it will be harsh to punish a poor trackman acting as Gateman. There was never any departmental training to the trackman for handling any gate and since the Joint Enquiry Committee's report found the outsiders responsible for the accident in forcibly opening the gate, Disciplinary Authority should have taken into consideration the ground reality instead of finding a escape goat in holding the Gateman responsible for the untoward accident. This is a novel way of slinging mud on others instead of making an introspection, what could have prevented the accident.

6. Apart from the factual scenario, coming to the legal aspect, it may be seen that the entire disciplinary proceeding was running contrary to



the approved norms, rules and practice. Not a single witness was examined or any document adduced to prove delinquency of the applicant. Secondly, there is nothing on record to show that the report of the Enquiry Officer was served on the delinquent employee prior to passing of the order of the Disciplinary Authority or giving him opportunity to show cause on the enquiry report. Thirdly, when the Joint Enquiry Committee did not held the Gateman to be responsible, how and on what basis, the Disciplinary Authority found the delinquent employee guilty of misconduct when there is hardly any space left to inform the Station Master soon after opening of the gate, as no sooner did the tractor enter into the railway track area than the engine of the train collided with the tractor. Since we found the punishment without any legal basis, we feel it expedient to quash the punishment order in the larger interest of justice, equity and good conscience. Furthermore, the original order of the Disciplinary Authority was passed way back on 21.05.2012 and as the Appellate Authority has not passed any order and rather sat over the same, it will be futile to give him further rope to handle the same at much belated stage. We conclusively find that no misconduct is made out as things happened in quick succession without giving any space for a Gateman to inform the Station Master



about such forcible opening of the gate by miscreants. Hence ordered.

In the opinion of the Court, the reinstatement of the petitioner in the above given background and finding was the natural corollary. No other decision would have done justice to the petitioner. The railway administration was basically trying to find a scape goat in the petitioner for a larger responsibility, which is upon Railway Administration and which has also been talked about in paragraph 4 of the impugned order.

However, while setting aside the order of removal and reinstating the petitioner, the Tribunal has directed that the period since his removal till his reinstatement will be treated as 'dies non' or will be covered by the principle of no work no pay.

In the opinion of the Court, the principle of no work no pay cannot be applied in the given facts and circumstances. Here was the case where the petitioner was prevented from performing his duty because of an otherwise *per se*, arbitrary and illegal order of removal passed against him and which was found to be so by the Tribunal and that was the basis for setting aside the order of removal. The employee, therefore, would be entitled to all the benefits as if the order of removal was never passed against him, especially when the decision was declared to be an arbitrary



decision *per se* in law.

The submission of the learned counsel representing the Railways is that the petitioner cannot choose part of the order as well as ignore the other part, which is not beneficial to him and, therefore, the writ application ought to be dismissed. In this regard he relied on a decision of the Hon'ble Supreme Court in the case of ***R.N. Gosain Vs. Yashpal Dhir*** reported in (1992) 4 SCC 683. Reference has been made to paragraph 10 of the said decision, which is reproduced hereinbelow :

10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See : Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd., Scrutton, L.J.] According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508)"



Having considered the above submission and the observation of the Hon'ble Supreme Court the principle of approbate and reprobate does not apply in the case of the present writ application. It is not a case that the petitioner is selectively choosing to accept part of the order and resist the other part, in fact, the petitioner is entitled to his payment of salary for the period he was illegally removed and quashing of the order of illegal removal would amount to placing the petitioner back on his post as if no damage was done in between.

The other decision on which reliance has been placed is the case of *Union of India and Ors. Vs. Jaipal Singh*, reported in **2004(2) PLJR 92(SC)**. Here, the principle is that an employer cannot be compelled to pay for the period work has not been taken from the employee.

As a principle, there cannot be any quarrel for what has been submitted by the learned counsel or the ratio which has been laid down by the Hon'ble Apex Court, but since such a principle is universal in application and varies from fact to fact, the Court, therefore, comes to a considered opinion that the decision of the Tribunal not to direct payment of salary and remuneration of the petitioner for the period of otherwise an illegal removal cannot be sustained.



Writ application is allowed. Respondent Railways are directed to pay the salary of the petitioner for the period 21.05.2012 to 31.05.2015.

(Ajay Kumar Tripathi, J)

(Nilu Agrawal, J)

Rajesh/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	25.01.2017
Transmission Date	

