IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.224 of 2017

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Siyalal Sahu, son of Dasho Sahu, R/o- Mohalla- Mahatma Gandhi Nagar, P.S. Agamkaun, P.O. Bahadurpur Housing Colony, Patna

.... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary Government of Bihar, Patna.
2. Principal Secretary, Animal Husbandry and fisheries Resources Department, Bihar Patna
3. Director Fisheries Bihar, Patna
4. Under Secretary to the Government, Animal Husbandry and Fisheries Resources Department, Government of Bihar, Patna

.... Respondent/s

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Appearance :

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

For the Respondent/s : Mr. Mukul Prasad, A.C. to GP18

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 11-07-2017

Heard Mr. Dinu Kumar, learned counsel for the petitioner and Mr. Mukul Prasad A.C. to G.P.18 for the State.

The writ petition was initially filed for questioning the information provided to the petitioner under the Right to Information Act by the Under Secretary- cum- Public Information Officer, Animal Husbandry and Fisheries Resources Department, Government of Bihar dated 28.10.2016, a copy of which is impugned at Annexure-7 to the writ petition, whereby he was informed that his pension is to be reduced by 10% permanently. It is while the writ petition is pending consideration that an order was passed by the State Government in its

Animal Husbandry and Fisheries Resources Department dated 2.3.2017 whereby in exercise of powers vested under Rule 43(b) of the Bihar Pension rules (hereinafter referred to as 'the Pension Rules'), 10% of the pension of the petitioner was reduced on a permanent basis. The petitioner by filing I.A.No.1935 of 2017 sought leave of this Court to question the order of deduction of pension impugned at Annexure-8 to the interlocutory application and this Court taking note of the contest, allowed the prayer vide order passed on 7.7.2017.

The issue in contest stands noted in the order of this Court passed on 7.7.2017 and briefly stated is that while the petitioner superannuated from the post of Executive Engineer with effect from 31.12.2009, it is almost after 2 years thereafter that the State thought it proper to initiate proceedings under Rule 43 (b) of 'the Rules' by serving a charge memo contained in the resolution bearing No.401 dated 21.7.2011, a copy of which is placed at Annexure-3 to the writ petition. The charge memo substantially casts aspersions on the petitioner on his supervisory control over some construction work. The charge memo while attributing casual approach by the Junior Engineer which delayed the completion of the construction work alongside charges the petitioner of not taking effective steps for improving the situation except indulging in unnecessary correspondence. The charge memo also mentions that the measurement book was not acted upon by the petitioner and charges him of being party to defalcation. The details of the defalcation is however completely missing.

The petitioner on his part while responding to the proceeding and also questioning it on its validity in view of the stipulations present under Rule 43(b) by filing an exhaustive reply vide Annexure-4 participated in the proceedings which has resulted in the order impugned of Annexure-8 to the Interlocutory application.

Mr. Dinu Kumar, learned counsel for the petitioner while questioning the entire proceeding beginning from the issuance of the charge memo has submitted that except for the sweeping allegations made against the petitioner of not having proper supervisory control over the construction work there is nothing on the charge which attributes any misconduct on the petitioner or of being involved in any way in the alleged defalcation. In reference to the enclosure to the chargememo he submits that although no details of alleged defalcation has been given, it can be gathered from the impugned order at Annexure-8 that it is the advance of Rs.27.25 lacs given by the Assistant Engineer to the junior Engineer which is at the foundation for the exercise and a plain reading of the details of the disbursement made by the Assistant Engineer at running page 29 of the proceeding would show that the amounts were disbursed by Ramashankar Upadhyay, Assistant Engineer to Rajeshwar Singh the Junior Engineer in between the dates 1.12.1995 to 12.12.1997 i.e a period of almost 14 years from the date of initiation. He next in reference to the order impugned at Annexure-8 submits that in substance the allegation against the petitioner is that as an Executive Engineer he did not come up to the expectation of the respondents. He thus submits that neither on merits nor on the issue of limitation so prescribed under 'the Pension Rules' is the proceeding sustainable as charges do not constitute any misconduct.

The arguments of Mr. Dinu Kumar has been contested by Mr. Prasad A.C. to G.P.18. It is submitted that as an Executive Engineer the petitioner was required to have a supervisory control over his subordinate and very fact that though the project was started in the year 1995 it could not be finished until his retirement, is sufficient explanation to his failure to maintain control over his subordinates. He submits that since substantial amount had been advanced to the Junior Engineer for carrying out the construction work which remained incomplete, the petitioner is also liable to share the burden of punishment.

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

Since proceedings have been initiated in exercise of powers vested in the State Government under Rule 43(b) of 'the Pension Rules' it would be appropriate to examine the pre-requisite to such exercise.

Rule 43(b) of 'the Pension Rules' enables the State Government to withhold or withdraw the pension of a Government servant or any part thereof either permanently or on temporary basis in case, where the petitioner is found in a departmental or judicial proceeding, guilty of grave misconduct or is found to have caused pecuniary loss to the Government by such act of grave misconduct.

The enabling provision is not free from limitation rather proviso (ii) attached to Rule 43(b) puts an embargo on such exercise if it relates to any event which falls beyond four years of institution of any such proceeding. Meaning thereby, the State Government can initiate a proceeding in exercise of power vested under Rule 43(b) of 'the Pension Rules' but only if the action complained of is within the period of 4 years of initiation of such proceeding.

The three issues that would require consideration in the present case is:-

(a) Whether the action complained of against the petitioner would fall within the definition of a misconduct;

(b) Whether the petitioner has caused pecuniary loss to the State Government by his misconduct; and

(c) Whether the action complained of falls within the limitation prescribed under proviso (ii) attached to Rule 43(b) of 'the Pension rules' i.e, it is within the four years period from the date of initiation of the proceeding which was initiated on service of a charge Memo dated 21.7.2011 present at Annexure-3.

I would straightway refer to the chargememo at Annexure-3 and it would not take me long to hold that the charges are absolutely vague and could not have been a foundation for drawing even a disciplinary proceeding muchless a proceeding under the Bihar Pension Rules. All that the allegations present at Form (d) at Annexure-3 would reflect is, that the petitioner was casual in discharge of duty as an Executive Engineer and did not take sufficient and meaningful steps for expediting the 'Machuwa Awas' construction work. To make the charge appears serious that an allegation of defalcation has been included in the last line with no descriptive details. A proceeding under 'the Pension rules' is not a routine affair rather it is only where the State Government is satisfied that a retired Government servant has been guilty of grave misconduct or has caused pecuniary loss to the State Government by such grave misconduct, that it can be exercised. In my opinion none of the steps towards such exercise stands fulfilled in the present case rather it is on a vague chargesheet which has only words of criticism on the petitioner on his efficiency, that the respondents proceed to draw power to initiate proceedings under Rule 43(b) of 'the Pension rules'.

It is taking note of the totality of circumstances that the Enquiry Officer after holding enquiry and taking note of the defence raised, submitted his report at Annexure-5 exonerating him of the allegations. The disagreement note which encloses the enquiry report at Annexure-5 again contains nothing requiring an explanation of the petitioner. The disagreement note without taking note of the explanation given by the petitioner has charged the petitioner on his failure to give fruitful suggestions on the constructions. The petitioner responded to the second show cause notice and has been visited with the impugned order of penalty impugned at Annexure-8 and which again except commenting upon the inefficiency of the petitioner, has no comments either on his collusion in the matter or of being a part of the defalcation. In fact the State Government at paragraph 5 while taking note of the stand taken by the petitioner as regarding his limited powers on financial matters as well regarding the financial powers vested in the Director, Fisheries, has simply proceeded to draw conclusion on the legal advise tendered in the matter.

Neither the order impugned concludes that the act of the petitioner amounts to 'grave misconduct' nor does it charge the petitioner of causing pecuniary loss to the State Government rather it is only because the work initiated in the year 1994-95, did not complete until the retirement of the petitioner, that the proceeding in question has been drawn which has no foundations. It is long settled that inefficiency cannot be held a 'misconduct' until it has a disastrous effect. There is no such allegation present in the charge. Reference in this regard is made to a judgment of the Supreme court reported in **(1979) 2 SCC 286 (Union of India Vs. J. Ahmad)** wherein the Supreme Court while discussing on the issue of misconduct has held that a lack of inefficiency and lack of indecisiveness ipso facto, cannot constitute a misconduct to invite a disciplinary proceedings, unless the consequences are serious.

Reference is made to paragraph 11 of the judgment which runs 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 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."

(Emphasis supplied)

The nature of the charges facing the petitioner at Annexure- 7 as well as the opinion drawn by the State Government in its Animal Husbandry and Fisheries Resources Department, is simply resting on the failure of the petitioner to attain the highest degree of efficiency and nothing further. Apart from the fact that a vague charge memo present at Annexure-3 could not have been a subject mater of a disciplinary proceeding muchless a proceeding under 'the Pension Rules', in my opinion, the allegations if it taken on its face value, do not constitute a misconduct and considering that it relates to the period 1994-95 when the money handed was over to the Junior Engineer by the Assistant Engineer and not the petitioner, as confirmed from the running page 29 of the proceedings, merely because the project remained incomplete, it would not condone the delay in initiating the present proceeding.

For the reasons and discussions above the entire proceedings drawn against the petitioner beginning the service of charge memo at Annexure-3 together with the final order imposing a penalty of reduction of pension at the rate of 10% on permanent basis vide memo No.61 (Ni.Gro.) dated 2.3.2017 impugned at Annexure-8 to the interlocutory application cannot be upheld and is accordingly quashed and set aside. The writ petition is allowed. The amount of pension if any, recovered from the petitioner, be refunded to him within 3 months from the date of receipt/production of a copy of this order.

The writ petition is allowed with the direction aforementioned.

(Jyoti Saran, J.)

Bibhash/-

AFR/NAFR	AFR
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