

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No. 13898 of 2010

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Ram Prasad Paswan, S/o Sri Mahajan Paswan, R/o Vill.- Bhachchhi,
P.S. Madhubani, Distt.- Madhubani, Presently Posted as Assistant
Engineer, Advance Planning Division No.1, Building Construction
Department, Patna.

.... Petitioner.

Versus

1. The State of Bihar.
2. The Principal Secretary, Road Construction Department,
Government of Bihar, Bishweshwaraiya Bhawan, Bailey Road,
Patna.
3. The Secretary Building Construction Department, Government of
Bihar, Bishweshwaraiya Bhawan, Bailey Road, Patna.
4. The Engineer-In-Chief - Cum - Additional Secretary - Cum - Special
Secretary Road Construction Department, Government of Bihar,
Bishweshwaraiya Bhawan, Bailey Road, Patna.
5. The Engineer-In-Chief - Cum - Additional Secretary - Cum - Special
Secretary Building Construction Department, Government of Bihar,
Bishweshwaraiya Bhawan, Bailey Road, Patna.
6. The Additional Secretary, Road Construction Department,
Government of Bihar, Bishweshwaraiya Bhawan, Bailey Road,
Patna.
7. The Chief Engineer, North Bihar Wing Building Construction
Department, Bihar, Patna.
8. The Joint Secretary-Cum-Chief Vigilance Officer Building
Construction Department, Government of Bihar, Bishweshwaraiya
Bhawan, Bailey Road, Patna
9. The Deputy Secretary, Building Construction Department,
Government of Bihar, Bishweshwaraiya Bhawan, Bailey Road,
Patna.

.... Respondents.

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Appearance :

For the Petitioner : Mr. S.B.K. Mangalam, Adv.

For the Respondents: Mr. P. K. Verma, AAG3

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

ORAL JUDGMENT

Date: 10-08-2017



Heard parties and perused the records of the case.

Through this writ application, the petitioner, *inter alia* seeks following reliefs:-

(i) *For issuance of an appropriate writ in the nature of CERTIORARI for quashing the letter dated 14.05.2007 issued under the signature of the Respondent no. 9 and contained in his letter no. 4210 Patna dated 14.05.2007, whereby and where under the petitioner was directed to deposit a sum of Rs. 2,75,000/- along with the amount of interest of Rs. 71,500/- in the Government Treasury in installments and till the total amount is deposited, the petitioner was restrained from withdrawal of his salary.*

(ii) *For issuance of an appropriate writ in the nature of CERTIORARI for quashing the letter dated 01.07.2010 issued under the signature of the Respondent no. 6 and contained in his memo no. 9682 dated 01.07.2010, whereby and where under the petitioner has been awarded following three punishments :-*

(a) *He has been reverted from the post of Assistant Engineer (Civil) to the post of Junior Engineer (Civil) at the minimum salary of pay ;*

(b) *Direction has been issued for recovery of Rs. 2,75,000/- from the petitioner along with interest @ 10% ; and*

(c) *The petitioner would always be posted in non-works during the entire period of service.*

(iii) *For issuance of an appropriate writ*



in the nature of MANDAMUS, commanding and directing the Respondent Authorities to pay the full salary to the petitioner for the period May, 2007 to 20th May, 2009 and from 21.05.2009 to till date the half salary, which has been withheld by the Respondent because of the impugned order passed against the petitioner.

(iv) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioner would be found entitled under the facts and circumstances of the case.

The petitioner was appointed as Junior Engineer in the Road Construction Department in the year 1984 and was subsequently promoted to the post of Assistant Engineer in the year 1996 w.e.f. 1991. After his promotion as Assistant Engineer in the year 1996, his services were sent on deputation to the Building Construction Department and was posted there as Assistant Engineer in Building Design Circle No. 1, Patna and remained as such till June, 2003. In July, 2003, the Building Construction Department posted the petitioner as Assistant Engineer, Building Division, Supaul where he had received advance of Rs. 5,75,000/- from the Executive Engineer, Building Division, Supaul. Petitioner claims that the aforesaid amounts were given to the Junior Engineers for the purpose of renovation of Primary Health Centres, Bhim Nagar, Balua Bazar, Ganpatganj and Kishanpur. However, a



complaint was filed before the Lokayukt, Bihar regarding the embezzlement of the aforesaid amount. After inquiry, a letter was issued by the Under Secretary of Lokayukt for taking action against the petitioner for recovery of Rs. 2,75,000/- with interest at the market rate and for his demotion and posting in non-works places. The petitioner was served with letter dated 14.05.2007 and was directed that until he deposits the amount, he would not withdraw the salary. The petitioner further claims that the aforesaid order was passed without initiating any departmental proceeding and even without obtaining a formal show cause from him. His salary was withheld though he was working on the post. Thereafter, on 17.04.2009, 50% of salary was directed to be paid to the petitioner but it was not made effective so far previous salary of the petitioner was concerned. It is further stated that the Office of the Lokayukt had also communicated its recommendation to the Road Construction Department vide letter no. 1259 dated 29.05.2006 and on recommendation of the Office of the Lokayukt, a proceeding under rule 17 of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 was initiated for the charges of serious irregularities while he was posted as Assistant Engineer, Building Sub-division, Supaul. A charge-sheet was served upon the petitioner vide Annexure-6 setting out three charges against him.



The petitioner claims to have appeared in the departmental proceeding and filed written statement denying the charges explaining the expenditure. A retired Joint Secretary, Road Construction Department was appointed as Conducting Officer and submitted his report on 19.12.2006, a copy of which has been appended as Annexure- 8 & 8/1. The Inquiry Officer came to the conclusion that charges against the petitioner stands proved and, therefore, recommended for appropriate punishment. Thereafter, on receipt of the inquiry report, Deputy Secretary of the State Government, Road Construction Department, Government of Bihar issued a letter no. 2225 dated 22.02.2007 describing it as the second show cause set out following proposed punishment vide Annexure- 9:-

“(1) आपसे 2,75,000/- (दो लाख पचहतर हजार) रुपये की वसूली बाजार दर पर प्रचालित सुद के साथ किया जाय।

(2) आपको योजना कार्य से हटाकर Nonworks में रखा जाय।

(3) आपको पदावनत किया जाय।”

The petitioner submitted his reply to the second show cause notice on 02.07.2007, a copy of which is appended as Annexure-10 explaining the expenditure etc. made by him and refuting the findings made in the inquiry report. However, the competent authority of the State, after seeking concurrence of the



Bihar Public Service Commission awarded following punishment
vide Annexure-11:-

“(क) इन्हें सहायक अभियंता (असैनिक) के पद से कनीय
अभियंता (असैनिक) के न्यूनतम प्रक्रम पर पदानवत
किया
जाता है।

(ख) इनसे 2,75,000/- (दो लाख पचहत्तर हजार) रु० की
वसूली बाजार दर से 10 प्रतिशत सूद सहित करने का
आदेश दिया जाता है।

(ग) इन्हें पूरे सेवा काल में अकार्य पदस्थापन का आदेश
दिया जाता है।”

Hence, this writ petition.

Apart from assailing the order on merit, it is contended on behalf of the petitioner that by supplying a copy of inquiry report along with Annexure-9 directly a second show cause notice was issued on the proposed punishment which is not permissible in law. In support of his submission, learned counsel for the petitioner has placed reliance upon the decision of the Apex Court rendered in **Punjab National Bank and others v. Kunj Behari Misra [(1998) 7 Supreme Court Cases, 84]** as well as **Yoginath D. Bagde v. State of Maharashtra and another [(1999) 7 Supreme Court Cases, 739]**. He also places reliance upon a decision of a Single Bench of this Court rendered in **Yogendra Prasad Singh v. The State of Bihar and others (2007(Supplementary) Patna Law Journal Report 154)** and a reported judgment of this Court dated



07.10.2015 passed in CWJC No. 7114 of 2010 [**Mahesh Kumar vs. The Samastipur Kshetriya Gramin Bank (Sponsored by State Bank of India and others)**].

Per contra, counter affidavit has been filed on behalf of the respondent nos. 2, 4 and 6 stating that inquiry was conducted by Vigilance Cell of Lokayukt and recommendation was to take action against the petitioner as the charges were grave. On the recommendation of the Lokayukt direction was given to the petitioner to deposit Rs. 3,46,500/- in the Government Treasury and it was further directed that until he deposits the amount he would not withdraw the salary. However, the petitioner was granted 50% salary vide Annexure-4 to the writ petition. A proceeding was also initiated against the petitioner and the Conducting Officer submitted the report vide Annexure-8 finding the petitioner guilty of all the charges, thereafter, by letter no. 2225 dated 22.02.2007, a second show cause notice was issued to the petitioner for answering proposed punishment vide Annexure-9 to which the petitioner submitted his show cause vide Anneuxre-10 which was considered and found unsatisfactory.

However, at the time of hearing, on consideration of the submission made on behalf of the rival parties following questions emerge for adjudication by this Court:-



- (i) whether the order of punishment passes the test of principle of natural justice?*
- (ii) whether final order of punishment has been passed after proper consideration of the reply to show cause submitted by the petitioner?*
- (iii) whether directly second show cause notice for proposed punishment could have been issued along with a copy of the inquiry report after concurring with the finding of the Inquiry Officer without granting any opportunity to the petitioner to comment on the finding recorded by the Inquiry Officer?*

All the aforesaid issues, being intertwined, have been considered altogether.

The Apex Court in **Kunj Behari Misra(supra)** has dealt with the relevant issue in detail. While doing so, it has also discussed the case of **Managing Director, ECIL v. B Karunakar[(1993) 4 Supreme Court Cases, 727]** as a question arose after Forty-second Amendment of the Constitution that, when the inquiry officer was other than the disciplinary authority, which is the fact in the case in hand also, whether the delinquent was entitled to get a copy of the report of the inquiry officer before the disciplinary authority takes a decision on the question of guilt of the delinquent? In that case also, it was sought to be contended that the



right to show-cause against the penalty proposed to be levied had been taken away by the Forty-second Amendment of the Constitution, therefore, there was no necessity of giving the delinquent a copy of the inquiry report before the disciplinary authority took the final decision as to whether to impose a penalty or not. Explaining the effect of Forty-second Amendment the Constitution Bench at page 755 in **B. Karunakar (supra)** observed as under:-

"All that has happened after the Forty-second Amendment of the Constitution is to advance the point of time at which the representation of the employee against the enquiry officer's report would be considered. Now, the disciplinary authority has to consider the representation of the employee against the report before it arrives at its conclusion with regard to his guilt or innocence of the charges." The Court explained that the disciplinary proceedings break into two stages. The first stage ends when the disciplinary authority arrives at its conclusions on the basis of the evidence, the enquiry officer's report and the delinquent employee's reply to it. The second stage begins when the disciplinary authority decides to impose penalty on the basis of its conclusions. It is the second right which was taken away by the 42nd Amendment but the right of the charged officer to receive the report of the inquiry officer was an essential part of the first stage itself. This was expressed by the Court in the following words:

"26. The reason why the right



to receive the report of the enquiry officer is considered an essential part of the reasonable opportunity at the first stage and also a principle of natural justice is that the findings recorded by the enquiry officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusions. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the enquiry officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the enquiry officer along with the evidence on record. In the circumstances, the findings of the enquiry officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the enquiry officer were only to record the evidence and forward



the same to the disciplinary authority that would not constitute an additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the enquiry officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusions, the delinquent employee should have an opportunity to reply to the enquiry officer's findings. The disciplinary authority is then required to consider the evidence, the report of the enquiry officer and the representation of the employee against it."

It has also been held in **Kunj Behari Misra (supra)** that even if the inquiry officer has given adverse finding, as per **Karunakar's case**, the first stage ends only when the disciplinary authority arrives at its conclusions on the basis of evidence, the inquiry officer's report and the delinquent employee's reply to it even when an opportunity was granted earlier by the inquiry officer during the course of enquiry. The first stage of inquiry is not completed till the disciplinary authority records its finding in the aforesaid manner. The relevant passages from the aforesaid decision are quoted as



under:-

“18. Under Regulation 6, the enquiry proceedings can be conducted either by an enquiry officer or by the disciplinary authority itself. When the enquiry is conducted by the inquiry officer his report is not final or conclusive and the disciplinary proceedings do not stand concluded. The disciplinary proceedings stand concluded with the decision of the disciplinary authority. It is the disciplinary authority which can impose the penalty and not the inquiry officer. Where the disciplinary authority itself holds an enquiry, an opportunity of hearing has to be granted by him. When the disciplinary authority differs with the view of the enquiry officer and proposes to come to a different conclusion, there is no reason as to why an opportunity of hearing should not be granted. It will be most unfair and iniquitous that where the charged officers succeed before the inquiry officer they are deprived of representing to the disciplinary authority before that authority differs with the enquiry officer's report and, while recording a finding of guilt, imposes punishment on the officer. In our opinion, in any such situation the charged officer must have an opportunity to represent before the Disciplinary Authority before final findings on the charges are recorded and punishment imposed. This is required to be done as a part of the first stage of enquiry as explained in Karunakar's case.

19. The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on



such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favorable conclusion of the inquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer.”

In **Yoginath D. Bagde (supra)**, the decision rendered in **Kunj Behari Misra (Supra)** came to be considered by the Apex Court and it was held that requirement of affording opportunity of hearing as held in **Kunj Behari Misra (supra)**, being in consonance with Article 311 (2) of the Constitution, has to be read even into a rule which does not make specific provision to this effect.

From perusal of the aforesaid judicial pronouncements, it is apparent that the Supreme Court has held that the effect after the 42nd Amendment of the Constitution would be to advance the stage at which the representation of the employee against the inquiry officer's report would be considered. Now, after the



aforesaid Constitutional Amendment, the disciplinary authority has to consider the representation of the employee against the inquiry report before it arrives at its conclusion with regard to his guilt or innocence.

Mr. P.K. Verma, learned Additional Advocate General-III made a submission that the earlier view of the Supreme Court has changed and a “no *prejudice theory*” has been propounded by it. It is contended that in the present case, a second show cause notice on proposed punishment was served upon the petitioner along with inquiry report and he was given an opportunity to make a reply thereof. He further places reliance upon a decision of the Apex Court rendered in **Indian Institute of Technology, Bombay vs. Union of India and Others [1991 (Suppl 2) Supreme Court Cases 12]** holding that the order of the disciplinary authority merely accepting the findings of the Enquiry Officer and proposing punishment would not require furnishing detailed reasons. On the strength of the aforesaid decision, it is urged that even if it is assumed that the final order is not the speaking one that would not change the situation as the same was not required as per the decision of the Apex Court discussed above.

In view of the aforesaid issues involved in the case, this Court has directed the State to produce the entire records of the



departmental proceeding including the decision taken by the competent authority upon the reply to the second show cause notice filed by the petitioner holding that the same was not found satisfactory after its analysis by the competent authority.

However, the learned counsel for the State has miserably failed to show from record that there is any consideration at all of the reply to the second show cause notice. Even if it is assumed, as per the stand taken by the State on the strength of the decision of the Apex Court rendered in **Indian Institute of Technology, Bombay (supra)**, that the reasoned order was not required to be passed, at least the matter was required to be considered by the competent authority.

So far “*no prejudice theory*” is concerned, that was a case in which inquiry report was not given to the petitioner then the Hon’ble Supreme Court came to the conclusion that since the delinquent had participated in the inquiry and was given opportunity by the Inquiry Officer to submit his stand, if no prejudice is caused, that omission would not vitiate the proceeding. However, in the present case, inquiry report was submitted but no opportunity was given to the petitioner to make a comment on the inquiry report rather a show cause notice on quantum of punishment was issued.



Prima facie, in view of the decision of the Apex Court rendered in **Indian Institute of Technology, Bombay (supra)**, it may appear that reasoned order was not be required in view of the “*no prejudice theory*”, thus, no relief can be granted to the petitioner ordinarily, however, on deeper scrutiny of the matter, it appears that in the facts and circumstances of the case at least consideration of one reply to the show cause notice was mandatory in the facts and circumstances of the case. Admittedly, the proceeding was conducted under Bihar Government Servants (Classification, Control & Appeal) Rules, 2005 (hereinafter referred to as “the Rules”). The aforesaid Rules provides minor penalty and major penalty. The first punishment which had been given vide Annexure-11 discloses that demotion from the post of Assistant Engineer (Civil) to Junior Engineer (Civil) is for the entire service period of the petitioner as no time period has been given during which the petitioner has to suffer such demotion, thus, obviously, it is a major penalty which has been imposed upon the writ petitioner. Apart from the above, it has also been ordered that during the entire service period he will only be posted at non-works post.

For consideration, as to what would be the action after submission of inquiry report, rule 18 of the Rules is being quoted for better appreciation:-



“18. Action on the inquiry report – (1) The disciplinary authority, if it is not itself the inquiring authority may, for reasons to be recorded by it in writing, may remit the case to the inquiring authority for further inquiry and report and the inquiring authority shall thereupon proceed to hold the further inquiry according to the provisions of rule 17 as far as may be.

(2) The disciplinary authority, after receipt of the enquiry report as per rule 17 (23)(ii) or as per sub-rule (1) , shall, if it disagrees with the findings of the inquiring authority on any article of charge, record its reasons for such disagreement and record its own finding on such charge, if the evidences on record is sufficient for the purpose.

(3) The disciplinary authority shall forward or cause to be forwarded a copy of the inquiry report, together with its own findings, if any, as provided in sub-rule (2), to the government servant who may submit, if he or she so desires, his or her written representation or submission to the disciplinary authority within fifteen days.

(4) The disciplinary authority shall consider the representation or submission, if any, submitted by the government servant before proceeding further in the manner specified in sub rules (5) and (6).

(5) If the disciplinary authority having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clauses (i) to (v) of rule 14 should be imposed on the government servant, it shall, notwithstanding anything contained in rule-19, make an order imposing such penalty.



(6) If the disciplinary authority, having regard to its findings on all or any of the articles of charge and on the basis of the evidence adduced during the inquiry is of the opinion that any of the penalties specified in [clauses (vi) to (xi) of Rule 14] should be imposed on the Government servant, it shall make an order imposing such penalty and it shall not be necessary to give the government servant any opportunity of making representation on the penalty proposed to be imposed.

(7) Notwithstanding anything contained in sub-rule (5) and (6), in every case where it is necessary to consult the Commission, the Commission shall be consulted and its advice shall be taken into consideration before making any order imposing any penalty on the government servant.”

(Emphasis is mine)

It is apparent from the above that rule 18(3) mandates that the disciplinary authority shall forward or cause to be forwarded a copy of the inquiry report, together with its own findings, if any, as provided in sub-rule (2), to the government servant who may submit, if he or she so desires, his or her written representation within fifteen days. Thereafter, under sub-rule (4), the disciplinary authority is mandatorily required to consider the representation or submission, if any, submitted by the government servant before proceeding further in the manner prescribed in sub-rules (5) & (6) of Rule 18. Sub-rule (5) lays down that if the



disciplinary authority, having regard to its findings on all or any of the articles of charge, is of the opinion that any of the penalties specified in clauses (i) to (v) of rule 14 should be imposed on the government servant, it shall, notwithstanding anything contained in rule-19, make an order imposing such penalty. It would be relevant to mention here that clauses (i) to (v) of Rule 14 deals with minor penalties only as would be evident from the provisions contained in rule 18 (5) read with rule 19 of the Rules. Minor punishment could be imposed without holding any inquiry in terms of rule 19. It can be imposed directly informing the government servant in writing of the proposal to take action against him in terms of rule 19(a) or after holding inquiry and considering his representation a decision can also be taken. However, if penalty is specified in clauses (vi) to (xi) of rule 14 being major penalty, is to be imposed by competent authority by passing an order imposing such penalty. It shall not be necessary to give the government servants any opportunity of making the representation on the penalty proposed to be imposed in the present proceeding.

In the present case, few fatal flaws appear to have been committed by the disciplinary authority. First is that mandate of rule 18(3) and (5) has been violated in the second show cause notice which has been appended as Annexure-9. It is stated that



disciplinary authority has concurred with the finding of the Enquiry Officer but it was totally forgotten that it has to forward and seek comment by the concerned officer. Since it was a major punishment, there was no requirement of second show cause notice at all seeking the comment of the government servants on the proposed penalty which has been done in the present case. Next flaw is that there is no consideration of the comments made by the petitioner in his reply as contained in Annexure-10. True, it is that the Apex Court in **Indian Institute of Technology, Bombay (supra)** has held that ordinarily no reasoned order may be required to be passed on the issue of second show cause notice that is on the issue of proposed penalty but here under the statutory Rules it is mandatorily required that before proposing any punishment, there should be consideration of the comments made by the government servants on the finding of inquiry officer or the disciplinary authority.

Thus, in my opinion, in such a situation, the order impugned as contained in Annexure-11 has to go as there is no consideration of the reply submitted by the petitioner before the competent authority as Mr. Verma, learned AAG-3 has miserably failed to show from the original records that there was in fact consideration of reply. Accordingly, the same is quashed and set



aside.

However, the matter is remitted back to the concerned authority to consider the reply to the show cause notice filed by the petitioner in terms of the provisions contained in rule 18(3) (4) (5) & (6) of the Rules and, thereafter, take an appropriate decision on its own merit and in accordance with law.

In the result, this writ application stands allowed.

Let the original records be returned to Learned Counsel appearing for the State.

(Dr. Ravi Ranjan, J.)

Vikash/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	05.09.2017
Transmission Date	NA

