

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.496 of 2017

Ashok Kumar Singh, Son of late Phagu Singh, Resident of Village- Khaira, P.S. Sahar, District- Bhojpur.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Secretary, Road Construction Department, Govt. of Bihar, Patna.
3. The Additional Secretary, Road Construction Department, Bihar, Patna.
4. The Deputy Secretary (Vigilance), Road Construction Department, Govt. of Bihar, Patna.

.... Respondent/s

Appearance :

For the Petitioner/s : Mr. Vinod Kumar Kanth, Sr. Adv. with
Mr. Prabhu Nath Pathak, Adv.
For the Respondent/s : Mr. Krishna Chandra, AC to AG

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 11-04-2017

Heard Mr. Vinod Kumar Kanth, learned senior counsel appearing for the petitioner who appears with Mr. Prabhu Nath Pathak, learned Advocate on record and Mr. Krishna Chandra, learned Assisting Counsel to the Advocate General for the State.

With the consent of the parties this writ petition has been heard with a view to its final disposal at the stage of admission itself.

The petitioner prays for issuance of a writ in the nature of certiorari for quashing the order contained in the notification bearing no.6928(S) dated 29.8.2016 passed by the Secretary, Road Construction Department, Government of Bihar, Patna, whereby the petitioner has been imposed a punishment of withholding of three annual increments with cumulative effect. A copy of the



punishment order is impugned at Annexure-1 to the writ petition.

A rather peculiar sequence of events accompanies the present writ petition. The petitioner holding the post of Assistant Engineer, Road Circle, Dalsingsarai in the district of Samastipur was proceeded against for using bricks having 5% less compressive strength by show cause notice dated 5.6.2008, a copy of which is enclosed at Annexure-2. The petitioner filed his reply explaining the situation vide Annexure-3 and was visited with the punishment of censure under a notification bearing No.14095(S) dated 27.9.2010 passed by the State Government in its Road Construction Department, a copy of which is placed at Annexure-4.

The matter rested at that stage and it is after a lapse of almost 11 months that the disciplinary proceeding so initiated against the petitioner resulting in the imposition of punishment of censure was reopened and when the State Government in its Road Construction Department vide notification bearing no.9633(S) dated 24.8.2011 recalled the punishment of censure and also reflected its intent of initiation of fresh disciplinary proceeding. The intent so shown in the notification placed at Annexure-6 was reduced in the resolution bearing Memo No.12120(S) dated 9.11.2011, a copy of which is impugned at Annexure-8 and whereunder a fresh proceeding under the provisions of rule 17 of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as the 'Disciplinary



Rules') initiated against the petitioner and the Chief Engineer, North Bihar Division, Road Construction Department, Darbhanga was appointed as the Conducting Officer while the Under Secretary (Headquarter), Road Construction Department, Bihar, Patna was appointed the Presenting Officer. The charge memo in Form 'क' stands enclosed with the resolution. The petitioner filed his reply to the second round initiation of disciplinary proceeding a copy of which is present at Annexure-9. The Enquiry Report is at Annexure 10 and in the opinion of the Enquiry Officer, none of the two charges were proved. The petitioner was served with the second show cause notice dated 9.12.2014 impugned at Annexure 11/A which again was replied by the petitioner vide Annexure-12. The punishment order of stoppage of three annual increments with non-cumulative effect was passed vide notification bearing no.4232(S) dated 15.5.2015 impugned at Annexure-13 and which was questioned by the petitioner before this Court in CWJC No.10290 of 2015. The petitioner while questioning the punishment also questioned the very initiation of second round of proceeding, however, the Bench chose to quash the punishment on the failure of the Disciplinary Authority in not abiding by the mandatory provisions of rule 18(2) of the 'Disciplinary Rules' to remit the matter which resulted in reiteration of the order impugned at Annexure-1 and the petitioner feeling aggrieved is before this Court.



Mr. Kanth, learned senior counsel appearing for the petitioner while accepting the position at Annexure-14 has submitted that the second disciplinary proceeding initiated vide Annexures 6 and 8 is void for the 'Disciplinary Rules' vests no such jurisdiction in the Disciplinary Authority to initiate a second round proceeding simply because the earlier punishment did not satisfy him. He submits that while the punishment of censure is also an order of the State Government, while purportedly exercising revisional jurisdiction under rule 28, in fact the State has exercised a review jurisdiction, which is not conferred under the 'Disciplinary Rules'.

Learned counsel in support has relied upon a judgment of the Supreme Court reported in **(1971) 3 SCC 844 (Patel Narshi Thakershi vs. Shri Pradyuman Singhji Arjunsinghji)** more particularly paragraph 4 to submit that a power of review is statutory and unless the statute confers such power, it cannot be exercised. He submits that power of review is not inherent rather has to be derived from the statute under which the statutory authorities concerned, exercises jurisdiction and which is missing in the present proceeding. Mr. Kanth, learned senior counsel appearing for the petitioner has also relied upon a judgment of the Supreme Court reported in **(2007) 11 SCC 517 (Kanai Lal Bera vs. Union of India)** and with a particular reference to paragraph 6 of the judgment he submits that no second round disciplinary



proceeding can be initiated for the self same charges.

Although Mr. Kanth also endeavours to question the proceedings on merits but in my opinion, the issues raised by Mr. Kanth can be tested on the legal issues raised.

Mr. Krishna Chandra, learned Assisting Counsel to the Advocate General has relied upon rule 28 of the 'Disciplinary Rules' to justify the impugned action of the State and to initiate a second round proceeding. Mr. Chandra, learned counsel for the State has also relied upon a judgment of the Supreme Court reported in **(2012)3 SCC 580 (Nand Kumar Verma vs. State of Jharkhand)** and with reference to paragraph 26 of the judgment he submits that the power of the forum to institute fresh proceeding on same charges where a proceeding has been quashed on procedural infirmity, has been confirmed.

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

The only issue which requires opinion of this Court is whether the initiation of second round proceeding by the State has a lawful sanction. Reliance is placed by the State to rule 28 in support of the exercise of jurisdiction by the State to draw a second round proceeding. Rule 28 of the 'Disciplinary Rules' reads as under:

- “28. Revision.-** (1) Notwithstanding anything contained in these rules,-
- (i) the Government, or
 - (ii) the head of a department directly under the Government, in the case of a Government servant serving in a department or office,



- under the control of such head of a department, or
- (iii) the appellate authority, or
 - (iv) any other authority specified in this behalf by the Government by a general or special order, and within such time as may be prescribed in such general or special order.

may at any time within six months of the date of the order proposed to be revised, either on his or its own motion or otherwise call for the records of any inquiry and revise any order made under these Rules or under the Rules repealed by the rule 32 (from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed), after consultation with the Commission where such consultation is necessary, and may-

- (a) confirm, modify or set aside the order, or
- (b) confirm, reduce, enhance or set aside the penalty imposed by the order, or impose any penalty where no penalty has been imposed, or
- (c) remit the case to the authority, making the order or to any other authority, directing such authority, to make such further inquiry as he may consider proper in the circumstances of the case, or
- (d) pass such other orders as it may deem fit:

Provided that no order imposing or enhancing any penalty shall be made by any revising authority unless the government servant concerned has been given a reasonable opportunity of making a representation against the penalty proposed and where it is proposed to impose any of the penalties specified in clauses (vi) to (x) of rule 14 or to enhance the penalty imposed by the order sought to be revised to any of the penalties specified in those clauses, no such penalty shall be imposed without an inquiry in the manner laid down in rule 17 and after giving a reasonable opportunity to the government servant concerned of showing cause against the penalty proposed on the evidence adduced during the inquiry and except after consultation with the Commission where such consultation is necessary:

Provided further that no power of revision shall be exercised by the head of department, unless-



- (i) the authority which made the order in appeal,
or
- (ii) the authority to which an appeal would lie,
where no appeal has been preferred.
-is subordinate to him.
- (2) No proceeding for revision shall be
commenced until after
 - ((i) the expiry of the period of limitation for an
appeal or
 - (ii) the disposal of the appeal, where any such
appeal has been preferred.
- (3) An application for revision shall be dealt with
in the same manner as if it were an appeal under
these Rules.”

A plain reading of the revisional jurisdiction so vested in the authorities named in rule 28(1) would show that the power can be exercised by the authorities concerned including the Government within six months of the order proposed to be revised and in consideration of the records of the disciplinary proceeding from which an appeal is allowed but from which no appeal has been preferred or from which no appeal is allowed. Unquestionably such revisional jurisdiction can be exercised by the Government for revising any order passed by an authority subordinate to the authority exercising the revisional jurisdiction. Admittedly in the present case the Disciplinary Authority of the petitioner is the State Government and who has imposed the penalty of censure on the petitioner vide notification bearing no.14095 (S) dated 27.9.2010 present at Annexure-4. Obviously the State Government could not have revised its own order. There is thus no confusion that it is in fact a review jurisdiction which is sought to be exercised by the



State Government in the garb of power vested under rule 28 of ‘the Disciplinary Rules’. It is eloquent that the ‘Disciplinary Rules’ vests no jurisdiction in the State Government or the Disciplinary Authority to exercise suo motu review jurisdiction except where a prayer to such effect is made by the person aggrieved under rule 24(2) which is the appellate jurisdiction but is not available to a delinquent where the disciplinary authority is the State Government. Meaning thereby where the order of punishment is passed by the State Government as the disciplinary authority, no appeal lies against the order of punishment and in such situation, a person aggrieved can pray for review of the order by way of a memorial before the Disciplinary Authority but no such power can be exercised by the State Government suo-motu. The judgment relied upon by Mr. Kanth, learned senior counsel appearing for the petitioner in the case of **Patel Narshi Thakershi** (supra) particularly paragraph 4 is a complete answer on the issue which reads thus:

“..... It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order. ”

Thus while there is no inherent power in the Government to review its own order, even the ‘Disciplinary Rules’ does not



confer any such jurisdiction on the State Government to exercise a suo-motu power of review. The supportive defence taken by Mr. Krishna Chandra to justify the order relying upon the provisions of rule 28 of the 'Disciplinary Rules', which is a revisional jurisdiction is misconceived because such power could not have been exercised by the State Government and the reasons are two fold:

(a) A revisional jurisdiction is exercised to revise an order of any subordinate authority against which an appeal lies but not preferred or no appeal lies. The proviso attached to Rule 28 further makes this position eloquent. In the present case the State Government has proceeded to revise its own order which is unsustainable in law.

(b) A revisional jurisdiction can only be exercised to confirm, modify, enhance, reduce or set aside any order of penalty or to remit the matter for further enquiry. Thus even the statutory provisions underlying rule 28 does not confer any jurisdiction in the revisional authority to initiate second round proceeding on self same charges *de novo*.

The judgment relied upon by Mr. Krishna Chandra in the case of **Nand Kumar Verma** (supra) does not come to his aid for even in the said judgment a second round proceeding has been permitted where a departmental proceeding is set aside by a competent forum on a procedural infirmity, which is not the case here.



Having considered the arguments of learned counsel and taking note of the uncontested legal position that the ‘Disciplinary Rules’ does not vest any jurisdiction in the Disciplinary Authority, be it, even the State Government acting as a disciplinary authority to set aside any disciplinary proceeding save and except the power to remit the matter where a need so arises for further enquiry, on the charges so framed, it is concluded that the exercise of power by the disciplinary authority is illegal, without jurisdiction and dehors the powers vested under rule 28 of the ‘Disciplinary Rules’.

For the reasons and discussions made above, the entire second round proceeding initiated against the petitioner vide notification bearing no.9633(S) dated 24.8.2011 impugned at Annexure-6 including the punishment order impugned at Annexure-1 cannot be upheld and are accordingly quashed and set aside.

The writ petition is allowed. The petitioner shall be entitled to consequential reliefs to which he is found entitled.

(Jyoti Saran, J)

SKPathak/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	10.05.2017
Transmission Date	NA

