

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.2613 of 2014

Chetan Kumar Markan, Son of Late Ramdev Markan Resident of Opposite
Uttar Bihar Gramin Bank, Regional Office, Srinagar Hata, Purnia- 854301,
Bihar

... .. Petitioner

Versus

1. The State of Bihar through The Chief Secretary, Government of Bihar, Patna
2. Principal Secretary, Road Construction Department, Government of Bihar, Visheshawaraya Bhawan, Patna
3. Secretary-Cum-Commissioner, Road Construction Department, Government of Bihar, Visheshawaraya Bhawan, Patna
4. Engineer In Chief-Cum-Additional Commissioner-Cum-Special Secretary, Road Construction Department, Government Of Bihar, Visheshawaraya Bhawan, Patna
5. Additional Secretary, Road Construction Department, Government Of Bihar, Visheshwaraya Bhawan, Patna
6. Joint Secretary, Road Construction Department, Government Of Bihar, Visheshawaraya Bhawan, Patna
7. Deputy Secretary (Vigilance), Road Construction Department, Government Of Bihar, Visheshawaraya Bhawan, Patna
8. Accountant General (A & E), Beerchand Patel Path, Patna, Bihar
9. Bihar Public Service Commission Through Its Chairman, 15, Jawahar Lal Nehru Marg, (Bailey Road), Patna

... .. Respondents

Appearance :

For the Petitioner	:	Mr. Kumar Kaushik, Advocate
For the Accountant General	:	Mr. Vivekanand Kumar, Advocate
For the State	:	Mr. Arun Kumar Sinha, A.C to G.P.-24
For the B.P.S.C.	:	Mr. Rajni Kant Jha, Advocate
		Mr. Neeraj Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

Date : 29-08-2018

Heard the parties.

This writ application under Article 226 of the Constitution
of India has been filed for quashing the order dated 25.03.2013
passed by the reviewing authority dismissing the review petition
of petitioner as well as order dated 07.11.2007 passed by



disciplinary authority imposing the punishment of the reversion from the post of Executive Engineer to the lowest scale of Assistant Engineer. Petitioner has further prayed to grant him notional promotion to the post of Superintending Engineer from the date on which persons junior to him were promoted with consequential benefits.

2. Briefly stated the facts of the case is that petitioner was appointed to the post of Assistant Engineer in August 1974 and was promoted to the post of Executive Engineer in October, 1993. While petitioner was posted as Executive Engineer Road Division Katihar, Central Bureau of Investigation registered a case being Special Case No. 13/97 (FIR No. RC2 27 (A)/ 97 dated 11.04.1997 with regard to transportation of bitumen from Barauni to Katihar.

3. Central Bureau of Investigation investigated the case in which petitioner was not named in the F.I.R. and during entire investigation C.B.I. did not find the complicity of petitioner as such no chargesheet was submitted by C.B.I. but re-commended the Road Construction Department to initiate departmental proceeding against the petitioner.

4. In pursuance of aforesaid recommendation the Road Construction Department initiated a departmental



proceeding against the petitioner under Rule 55 of Civil Services (Classification Control and Appeal) Rules vide Resolution dated 04.03.2002 (Annexure-3) issued by Additional Secretary Road Construction Department Government of Bihar, Patna. The following 3 charges were framed against petitioner of which charge no.1 and charge no.2 were held to be proved whereas charge no.3 was not proved. Three charges were as following:

Charge no.(i) he entered into a carriage agreement with M/s Tirupati Transport Agency Calcutta in respect of supply order no. 6946 (E) dated 16.11.93 issued from the office of the Engineer-in-chief, R.C.D., H.O., Patna requiring the HPCL to supply 500 Mt bitumen to him allowing there by the transporter to lift 482.64 M.T bitumen despite the fact that he had already in his stock more than 1000M.T. bitumen.

(ii) He issued pre signed consignee receipt certificates in a bunch to M/s Tirukpati Transport Agency Calcutta in respect of the aforesaid supply order allowing thereby the transporter to lift huge quantity of bitumen in one go from the Oil co. which



facilitated misappropriation of 248.545 M.T. bitumen by the transporter.

(iii) He failed to ensure submission of accounts by his subordinate Asstt. Engineer and the Junior Engineers, owing to which, the division remained in dark about the actual stock of bitumen available and pending supply.

5. It has been submitted that no first show cause was asked from petitioner and along with chargesheet inquiry officer and presenting officer were appointed by the disciplinary authority with a direction to conclude the inquiry within a period of two months. The list of witnesses which the department proposed to examine was not stated in the chargesheet and was never given to petitioner during entire departmental inquiry which is mandatory in view of letter no. 4288 dated 20.07.1997 issued by the State Government which clearly mandates that the list of witnesses and the list of evidence shall be clearly enumerated in the chargesheet. Letter no. 355 of C.B.I. which was a relevant document was also not provided to petitioner.

6. Department after lapse of more than one year from



the date of service of chargesheet directed the petitioner to submit his show cause within 15 days vide letter dated 21.04.2003 (Annexure-5). Petitioner submitted his comprehensive reply to the show cause notice vide letter dated 26.04.2003 denying all the charges framed by the department. Petitioner was not given the list of witnesses and he demanded the same by letter dated 19.03.2002 however, the same was not provided to him. Petitioner again demanded the evidentiary documents on basis of which charge was framed against him vide letter dated 06.09.2002 and letter no. 228 dated 23.10.2002 but same was not provided to him and thereafter petitioner was asked to submit reply to first show cause vide letter dated 21.04.2003 much after initiation of departmental inquiry and as such his reply was never considered by the disciplinary authority and proceeding continued without considering the reply of the petitioner to the first show cause.

7. The inquiry officer conducted the inquiry and submitted his inquiry report dated 16.01.2006 and found the first two charges to be proved whereas the third charge was not found to be proved. Although the inquiry report dated 16.01.2006 is exhaustive and lengthy but same is based on the findings and conclusions arrived by the C.B.I. and not arrived



by inquiry officer on the basis of evidences adduced during inquiry proceedings by the Department on its independent consideration without influenced by the findings recorded by the C.B.I.

8. The inquiry officer has relied upon statement of 6 witnesses recorded under Section 161 of Cr.P.C. made before the I.O. of C.B.I. during the investigation of Special Case No. 13/1997 out of which only 3 have been examined by the department and the statements of other witnesses have been considered and relied by the inquiry officer although they were not examined before the inquiry officer nor opportunity of their cross-examination was given to petitioner. Calender of evidence (list of evidence) was given but documents mentioned in the list was never given inspite of respondent request.

9. The inquiry officer has found the charges to be proved on the basis of documents collected by the C.B.I. and the author of those documents were not examined by the department before the inquiry officer in order to prove the contents of said documents.

10. Petitioner was issued second show cause notice along with a copy of inquiry report dated 16.01.2006 (Annexure-9) to submit his reply against the proposed



punishment of major penalty as well as findings of inquiry officer. Petitioner submitted his reply dated 16.02.2006 and 03.03.2006 (Annexure-10, Annexure-10/1) against the findings of inquiry officer to the disciplinary authority as well as against proposed punishment. The disciplinary authority in his said letter dated 16.01.2006 even prior to considering reply against inquiry report had found petitioner guilty of charges and had agreed with findings of enquiry officer.

11. Disciplinary authority thereafter passed the final order of punishment dated 07.11.2007 (Annexure-7) issued by Deputy Secretary, R.C.D. awarding punishment of reversion from the post of Executive Engineer in the lowest pay scale to the post of Assistant Engineer. The order passed by the disciplinary authority is cryptic and without any consideration of reply submitted by petitioner in reply to 2nd show cause.

12. Petitioner had moved this Hon'ble High Court earlier by filling C.W.J.C. No. 16134 of 2004 for quashing the chargesheet and granting him promotion to the post of Superintending Engineer from the date on which his juniors were promoted however order of punishment was passed during pendency of writ application and said writ petition was disposed of vide order dated 19.07.2012 giving liberty to petitioner for



filing review petition against the order of punishment and in compliance of same petitioner filed a review petition which was dismissed by impugned order dated 25.03.2013 (Annexure-1).

13. Counter affidavit has been filed on behalf of respondent in which in para 11 of their counter affidavit, it has been stated that non-disclosure of list of witnesses and list of evidence would not in any way vitiate the departmental proceeding after proper opportunity had been given to the delinquent officer to defend his case in a regular departmental proceeding. In para 12 of their counter affidavit, it has been stated that Central Bureau of Investigation has identified three charges against the petitioner while recommending for a departmental proceeding against the petitioner. The calendar of evidences and the inquiry report attached along with recommendation of C.B.I. has been made available to petitioner. In para 17 of their counter affidavit, it has been admitted that departmental inquiry has been initiated against the petitioner upon the recommendation of the C.B.I. The recommendation letter was enclosed with the calendar of evidences and inquiry report and recommendation was for initiation of departmental proceeding and no recommendation was made for awarding major punishment. In para 20 of their counter affidavit, it has



been submitted that petitioner has committed negligence in maintaining the accounts properly and to take followup action. It was due to his negligence huge amount of the Bitumen was misappropriated. The order was imposed after concurrence received from Bihar Public Service Commission.

14. After hearing the counsel for the petitioner and counsel for the State as well as counsel for the Accountant General and counsel for the B.P.S.C., the order dated 25.03.2013 passed by the reviewing authority as well as order dated 07.11.2007 passed by the disciplinary authority awarding punishment to the petitioner is not sustainable for following reasons.

(i) The disciplinary authority before issuing the 2nd show cause notice has already held petitioner to be guilty on the basis of finding recorded by the enquiry officer without considering reply of his 2nd show cause and also proposed punishment with 2nd show cause and as such he had pre-judged the issue and same is not permissible. The Apex Court in case of **H.P. State Electricity Board Ltd. Vs. the Mahesh Dahiya** reported in **2017 (1) SCC 768**

26. Both the learned Single Judge and the Division Bench have heavily relied on the fact



that before forwarding the copy of the report by letter dated 02.04.2008 the Disciplinary Authority-cum-Whole Time Members have already formed an opinion on 25.02.2008 to punish the writ petitioner with major penalty which is a clear violation of principle of natural justice. We are of the view that before making opinion with regard to punishment which is to be imposed on a delinquent, the delinquent has to be given an opportunity to submit the representation/reply on the inquiry report which finds a charge proved against the delinquent. The opinion formed by the Disciplinary Authority-cum- Whole Time Members on 25.02.2008 was formed without there being benefit of comments of the writ petitioner on the inquiry report. The writ petitioner in his representation to the inquiry report is entitled to point out any defect in the procedure, a defect of substantial nature in appreciation of evidence, any misleading of evidence both oral or documentary. In his representation any inputs and explanation given



by the delinquent are also entitled to be considered by the Disciplinary Authority before it embarks with further proceedings as per statutory rules. We are, thus, of the view that there was violation of principle of natural justice at the level of Disciplinary Authority when opinion was formed to punish the writ petitioner with dismissal without forwarding the inquiry report to the delinquent and the order of the High Court setting aside the punishment order as well as the Appellate order has to be maintained.

(ii) The order passed by disciplinary authority is cryptic non-speaking and no reasons has been assigned for passing order of punishment. A Division Bench of this Court **Hassan Muzahid Vrs. The Bihar State Electricity Board & Ors** in para 7 has held as following:

7. The petitioner was dismissed by the Disciplinary Authority, after conducting enquiry. The only flaw pointed out by the petitioner and the one that weighed with the learned Single Judge, is that the Disciplinary Authority did not



furnish any reason in support of his conclusions.

It needs hardly any mention that the issuance of second show cause has a definite purpose to serve and that is the only occasion, or avenue where the delinquent employee can make an attempt to convince the Disciplinary Authority that the findings by the Enquiry Officer are not correct. He can also impress upon the Disciplinary Authority that the proposed punishment need not be awarded and he can plead extenuating circumstances. Since, the order passed by the Disciplinary Authority was passed without taking into account, the grounds pleaded by the delinquent employee in his reply to the second show cause, it certainly turns to be defective. Time and again, the Hon'ble Supreme Court held that such exercise tends to be violative of one of the facets of the principles of natural justice, and the opportunity given to an employee would be reduced to empty formality. We, therefore, do not find any basis of interfere with the view taken by the learned Single Judge



in this behalf.

(iii) The first show cause is to be issued by the disciplinary authority to the delinquent and its reply has to be considered by the disciplinary authority and on being not satisfied with the reply of delinquent the disciplinary authority shall appoint inquiry officer and presenting officer however, in the present case the first show cause has been issued by the department after issuance of chargesheet and initiation of department proceeding and appointment of inquiry officer as well as presenting officer and such issuance of first show cause was an empty formality. The calendar of evidence and inquiry report on basis of department proposed to prove the charges were given not provided along with chargesheet as such initiation of department proceeding was flawed from its inception.

Division Bench of this Court in a judgment reported in 1996 (2) PLJR 95 (**Ravindra Nath Singh vs. Bihar State Road Transport Corporation**) the Division Bench has held as the following in at paragraph 6 of the judgment:

"6.The Enquiry Officer is not the competent authority to consider the reply to the charges. It is for the disciplinary authority to consider the reply to charges and on consideration of the causes shown in the reply to decide as to whether to close or to continue with the proceedings by holding domestic enquiry into the



charges."

(iv) The memo of charges were not accompanied by the list of witnesses and list of evidence upon which the department proposes to prove the charge and same being contrary to mandatory provision of disciplinary proceeding and in violation of principles of natural justice as delinquent must have all materials adverse against him so that he could file a effective reply to the charges and defend him and non-supply of which vitiates departmental proceeding.

The Apex Court in **Bilaspur Raipur Kshetriya Gramin Bank and Ors Vs. Madanlal Tandon**, since reported in **(2015) 8 SCC 461 para 5 and 9** Has held that non-furnishing of list of evidences and documents to the delinquent goes to the root of the proceeding and vitiates the entire proceedings

"5. Aggrieved by aforesaid decision, the appellants preferred writ appeal, wherein Division Bench of the High Court, after perusing the record, found that although the show cause notice was served along with 17 charges, but no documents were supplied along with the show cause to the respondent. Even the list of documents sought to be relied during the inquiry was not supplied along with the show cause.

The Division Bench opined that it is trite law that when a delinquent employee is facing disciplinary proceeding, he is entitled to be afforded with a reasonable opportunity



to meet the charges against him in an effective manner. If the copies of the documents are not supplied to the concerned employee, it would be difficult for him to prepare his defence and to cross-examine the witnesses and point out the inconsistencies with a view to show that the allegations are false or baseless.

9. Indisputably, no documents were supplied to the respondent along with the charge-sheet on the basis of which charges were framed. Some of the documents were given during departmental inquiry, but relevant documents on the basis of which findings were recorded were not made available to the respondent. It further appears that the list of documents and witnesses were also not supplied and some of the documents were produced during the course of inquiry”.

(v) The delinquent has right to receive all the material against him on basis of which the disciplinary authority has formed an opinion of his prima facie satisfaction to initiate departmental proceeding and non-furnishing of the same proceeding itself has been held to bad. The entire department proceeding was based on materials collected by C.B.I. during investigation as such petitioner had the right to receive all materials against him and respondents were obliged to provide the same to petitioner. This Court in case of



Hari Sharan Thakur Vs. State of Bihar & Ors since reported
in **2008 (2) PLJR 49 in para 8** has held as follows:-

“8. Is settled law in service jurisprudence that in a departmental enquiry and/or a departmental proceedings, if there be any preliminary or primary investigation on basis of which a departmental enquiry or departmental proceedings is taken, the delinquent is mandatorily required to be given a copy of such preliminary or primary investigation report, failing which the entire proceedings are vitiated. It has been held that in that event serious prejudice is caused to the delinquent that he does not have full information of the case that he is required to meet. If an authority be needed for the purpose, reliance may be placed upon the judgment of the Apex Court reported in Union of India and Ors. V. Md. Ibrahim”.

(vi) The disciplinary authority has to initiate departmental proceeding against an employee on basis on material available before him that he is *prima facie* satisfied that the materials placed before him are sufficient for initiation of departmental proceeding and he cannot act upon the recommendation of C.B.I. only and abdicate his authority to that of recommendation made by C.B.I. In their counter affidavit, the respondents have admitted that departmental



proceeding was initiated on the basis of recommendation made by C.B.I. and not upon the personal satisfaction of disciplinary authority that there are sufficient materials before him on basis of which he is *prima facie* satisfied that departmental proceeding can be initiated against petitioner and thereafter he has to frame charge and also provide name of oral witnesses and documentary evidences to the delinquent upon which he proposes to prove the charges. The first show cause has to be issue to the delinquent by the disciplinary authority and on consideration of reply of delinquent he has to decide whether departmental proceeding is to be initiated or the proceeding should be dropped after consideration reply of the delinquent. The inquiry officer performs the duty of *quasi judicial* authority he has to consider the evidence produced by the department during departmental proceeding and oral witnesses have to be examined before him in presence of delinquent with a right of delinquent to cross-examine the witnesses. The inquiry officer cannot rely upon statement made under Section 161 Cr.P.C. before the investigation officer of C.B.I. as an evidence in inquiry proceeding. Those witnesses upon which department relies to prove the charges have to be examined before the inquiry officer. The inquiry officer cannot



rely upon documents collected during the investigation made by the C.B.I., those documents have to be produced before the inquiry officer and has to be proved before the inquiry officer and contents of said documents are to be proved by the author of said documents with liberty to delinquent to cross-examine only then the evidences of oral witnesses as well as contents of documentary evidence can be considered by the inquiry officer as evidence adduced before him. During proceeding in present case neither witnesses who were examined by the C.B.I. under Section 161 of Cr.P.C. were produced before the inquiry officer nor the documents was proved before the inquiry officer as such those cannot be relied upon by the inquiry officer in order to prove the charge against the petitioner.

The Apex Court in case of **Roop Singh Negi Vs. Punjab National Bank & Ors**, since reported in (2009) 2 SCC 570, has held as follows:-

“

14. Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all



the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence.

(vii) Assistant Engineer and Junior engineer who were also proceeded for similar charges have been imposed punishment of withholding of 3 increments with cumulative effect but petitioner has been imposed harsh punishment and as such there is violation of principle of parity in punishment. Petitioner was not sent up by the C.B.I. after conclusion of investigation as such petitioner cannot be held to be guilty of grave misconduct awarding major punishment. Petitioner has been alleged to be negligent in his duty and lack of proper supervision and could have been awarded some minor punishment.

15. For the aforesaid reasoning the order as passed by the disciplinary authority as well as the reviewing authority as contained in Annexure- 1 and Annexure- 7 are not sustainable and is accordingly quashed. Since the petitioner has retired from



the service and allegations were of negligence and lack of supervision and he was not chargesheeted by C.B.I. this court is not inclined to remit the case to the disciplinary authority to continue proceeding from the stage it stood vitiated. He is entitled for the salary for the period from the date of his reversion till date of his retirement and thereafter his pension has to be fixed on the post he was holding before reversion and arrears of pension as well as revision of pension and gratuity and other retiral benefits to be revised and re-calculated and paid to petitioner within three months from the date of receipt/production of a copy of this order. The respondents are also obliged to consider the case of petitioner for promotion to the post of Superintending Engineer from the date his juniors were promoted on the post of Superintending Engineer within three months from the date of receipt/production of a copy of this order.

Accordingly, the writ petition stands allowed.

(S. Kumar, J.)

Rajiv/-

AFR/NAFR.	
CAV DATE	
Uploading Date	
Transmission Date	

