

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3656 of 2011

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Ram Pravesh Sharma @ Ram Pravesh Prasad Sharma, son of late Kapildeo Narain Sharma, resident of Shri Mahendra Bhawan, Mainpura (Bhumihar Toli), G.P.O., Patna-800001.

.... Petitioner/s

Versus

1. The State of Bihar through the Secretary, Transport Department, Government of Bihar, Patna.
2. The Secretary, Bihar State Road Transport Corporation, Patna.
3. Bihar State Road Transport Corporation, Patna through the Administrator.
4. The Administrator, Bihar State Road Transport Corporation, Patna.
5. The Executive Engineer (Civil), Bihar State Road Transport Corporation, Patna.
6. The Sub-Divisional Manager, Bihar State Road Transport Corporation, Bhagalpur Sub-Division, Bhagalpur.
7. The Special Officer, (Departmental Works), Bihar State Road Transport Corporation, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Mritunjay Kumar, Adv.
For the State : Ms. Shally Kumari, AC to SC-24
For the Respondent-BSRTC: Mr. P.K. Verma, Sr. Advocate
Mr. Arvind Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

Date: 13-04-2018

The present writ application has been preferred for issuance of a writ of mandamus directing the respondent authorities to restore the appointment of the petitioner on the post of Divisional Traffic Manager as he was on the date of his dismissal vide office order no.165 dated 25.02.2010 and accordingly to allow him all the permissible dues which the petitioner would have been entitled to upon his retirement due on 28.02.2010 in the light of the appellate order dated 30.04.2010 (Annexure-12 to the writ application).



Petitioner has also challenged the order of dismissal vide office order No.165 dated 25.02.2010 as contained in Annexure-‘1’ to the writ application. According to the petitioner, against the order of dismissal passed by the Administrator who happened to be the Secretary-cum-Commissioner, Department of Transport, Govt. of Bihar, he had preferred an appeal before the Government in the concerned Ministry and the appellate authority i.e. the Minister, Transport Department, Government of Bihar acting as the appellate authority in terms of Rule 24(3) of the Bihar Government Servant (Classification, Control and Appeal) Rules, 2005 (hereinafter referred to as ‘Service Rules’) vide his order as contained in memo no.141 dated 30.04.2010 (Annexure-12 to the writ application) set aside the order no.165 dated 25.02.2010 and directed for payment of post-retiral dues of the petitioner, but the grievance of the petitioner is that, despite there being an order of the appellate authority, his post-retiral dues have not been paid. It is an admitted position at the bar that the order, as contained in memo no.141 dated 30.04.2010, passed by the Departmental Minister setting aside the order passed by the Administrator/Transport Secretary-cum-Commissioner has not been challenged by the Bihar State Road Transport Corporation (hereinafter ‘Corporation or respondent no.3’) before any competent court of law. The petitioner is, thus seeking a mandamus directing the respondent no.3 to implement the order,



though in prayer portion he has also challenged Annexure-‘1’.

BRIEF FACTS

2. Learned counsel for the petitioner submits that the petitioner was appointed in the Corporation in June, 1980 and was working there on the post of Divisional Manager. He was due to retire on 28.02.2010. Two charges were framed against him vide memo no.304 and 410 dated 08.01.2010 and 12.01.2010 respectively. The operational portion of the charges leveled against the petitioner has been stated in paragraph 9 of the writ application, which reads as under:-

“(i) In December, 2009, the income of the Corporation per effective kilometer was Rs.14.64 which was much less then Rs.18.37 per effective kilometer of December, 2008 and in the first six months of January, 2008 it had diminished to Rs.14.12 per effective kilometer as against Rs.18.01 per effective kilometer of January, 2009. Also, there was loss of revenue because 76% of the buses remained running off road as compared to those running on road. No improvement was there despite necessary directions of Divisional Managers in monthly meetings. These caused financial loss to the Corporation because of lack of supervision, negligence and apathetic approach towards work of the petitioner.

(ii) The vacant plot of land of the Sultanganj Bus



Stand was settled every year during Shrawani Fair through requisite procedure which in the ensure heavy revenue to the Corporation. Non-settlement of the said vacant plot during Shrawani Fair for the year 2009 resulted in loss to the Corporation to a tune of lakhs of rupees. These caused financial loss to the Corporation due to inefficiency, negligence of the petitioner.”

3. The petitioner submitted a detail and comprehensive reply on 01.02.2010, but, according to the petitioner, the same was not considered for the reason that the enquiry report in respect of charge, as contained in memo no.304 dated 08.01.2010, was already submitted on 30.01.2010 vide Annexure-2 to the writ application. It is submitted that similarly for the second charge, as contained in memo no.410 dated 12.01.2010, the petitioner gave a detail and comprehensive reply dated 27.01.2010, in the second enquiry report dated 04.02.2010 (Annexure- 2A of the writ application) the reply of the petitioner was mentioned, but the same was taken as insufficient to support the case of the petitioner.

4. By filing a supplementary affidavit, the petitioner has clarified his statements made in paragraph 10 of the writ application and submitted that from the report, as contained in Annexure-2, it would appear that charge was framed on 08.01.2010 granting only ten



days time to the petitioner to submit reply to the same. Further vide memo no.719 dated 23.01.2010 the petitioner was given a notice to submit his show cause and to appear in the departmental proceeding on 27.01.2010, but the petitioner was not able to furnish any reply because of his illness, the report was however submitted by the enquiry officer immediately thereafter within three days i.e. 30.01.2010. Learned counsel submits that from the entire narration of facts and events it would appear that the authorities were in unusual haste to complete the departmental proceeding even though the proceeding required much closer and proper scrutiny. As regards the report, as contained in Annexure-2A to the writ application, submission of the petitioner is that perusal of the said report would indicate that the same was prepared and submitted without following the proper procedure and the conclusion arrived at in the enquiry report was also not proper.

5. It is case of the of the petitioner that with regard to the settlement of vacant plot of land the petitioner had categorically stated in his reply that he had advertised for the said settlement in two Hindi daily newspapers i.e. Dainik Jagran and Hindustan dated 01.07.2009 and 02.07.2009 respectively. Copies of the newspaper cuttings containing the advertisement have been brought on record by way of Annexure-4 series. According to the petitioner it was also duly



propagated through announcement on loudspeaker in the main areas of Sultanganj, he had also inspected the site ten times, but no local person expressed his desire in the matter of taking settlement of the vacant land of the bus stand on the occasion of Shrawani Mela. It is the stand of the petitioner that in his reply he had stated that till 2008, the Railway Station was right in front of the bus stand but it was shifted about half kilometer in the east by constructing a new Railway Station at Sultanganj which was inaugurated prior to commencement of Sultanganj Mela, 2009. Due to non-commutation of local people by the bus, the bus stand settlement was not taken and for that there was no slackness on the part of the petitioner. The petitioner also mentioned that the Headquarters were regularly informed telephonically regarding progress of the settlement and it was also inquired that if Headquarters so desire the settlement may be granted at a lesser amount than that taken in past three years. No instructions were however received from the Headquarters.

6. Petitioner also contended that he had also informed vide memo no.1204 dated 03.07.2009 and memo no.1432 dated 29.07.2009 that only one person was desirous of taking settlement at Rs.1,50,000/-, even in this regard instructions were sought for from the department but the same were never received.

7. Learned counsel for the petitioner submits that stand



taken by the petitioner in his reply were not duly examined, the petitioner was not served with any evidence by which the Corporation would have proved the culpability of the petitioner, but the enquiry officer submitted his report holding the petitioner guilty of the charges, the enquiry officer also recommended for urgent action since the petitioner was retiring in February, 2010 from the services of the Corporation.

8. Referring the records enclosed with the writ application, learned counsel for the petitioner submits that two reports were made available to the petitioner vide memo no.1161 dated 15.02.2010 and the petitioner was called upon to submit his response within a period of seven days only. Pointing out memo no.1161 dated 15.02.2010 (Annexure-5 to the writ application), learned counsel for the petitioner submits that the Administrator of the Corporation while calling upon the petitioner to submit his response on the two enquiry reports proposed major punishment for acting negligently and thereby causing monetary loss to the Corporation. Submission is that from the aforesaid Annexure-5 it would appear that the Administrator of the Corporation was in undue haste to pass an order of major punishment.

9. It is the submission of the petitioner that he submitted a reply dated 18.02.2010 on which the enquiry reports were not acted. The matter went back to enquiry officer who called the petitioner to



appear within two days. Since he was himself having certain health issues, he could not appear on 22.02.2010. Further it appears from Annexure-6 to the writ application that on 21.02.2010, a notice was published in the newspaper requiring the petitioner to present himself before the Enquiry Officer on 22.02.2010 at 11.00 am, therefore it is apparent that the earlier enquiry reports were not acted upon by the Administrator. The petitioner represented with his medical papers of treatment before respondent no.4 i.e. the Administrator of the Corporation through his advocate stating that the petitioner was seriously ill and was undergoing treatment and requested for one week time to present himself before the said authority, but the Administrator (respondent no.4) was not inclined to grant any time, a fresh enquiry report dated 22.02.2010 (Annexure-I to the counter affidavit of respondent no.4) was prepared by the same enquiry officer who was the Officer on Special Duty (OSD). A perusal of Annexure-'I' would show that tentative findings of proof of charges were recorded by him, this time copy of Annexure-'I' was not made available to the petitioner. The Administrator who has exercising the power of the Managing Director proceeded to pass an order of dismissal of the petitioner vide Annexure-1 to the writ application.

10. The petitioner thereafter preferred an appeal before the government to the concerned Ministry against the order of his



dismissal as according to him the order of dismissal was passed without following the procedure established under the Service Rules particularly Rules 17 and 18. The appeal was registered as Appeal No.2/2010 with the government and a notice was served upon the respondent authorities on 09.03.2010 fixing 19.03.2010 as the date of hearing. In response to the notice, respondent no.4 did not appear and there was no response by and on behalf of the Corporation. Notices were issued by the appellate authority calling upon the Administrator of the Corporation with all documentary evidences but notices sent on 19.03.2010, 26.03.2010, 05.04.2010 and 13.04.2010 neither the Administrator nor his authorized representative appeared. After hearing the appellant and on perusal of records by a detail reasoned order vide memo no.141 dated 30.04.2010 (Annexure-12), the appellate authority set aside the order of dismissal as contained in Annexure-1 to the writ application. Learned counsel submits that the Administrator of the Corporation (respondent no.4), at the relevant time, was non-else but the Secretary, Transport Department, Government of Bihar who had passed the order of dismissal, therefore against his order the next higher authority in line was the Minister of the Department.

11. The petitioner represented before the respondent no.4 with the order passed by the appellate authority and requested



him to allow his post-retiral benefits in the light of the order of the appellate authority. A copy of the representation dated 04.05.2010 submitted by the petitioner has been enclosed as Annexure-13 to the writ application. The petitioner has, however, not been reinstated for the purpose of granting him retiral benefits, therefore, finding no other remedy to compel the respondent Corporation to pay his post-retiral benefits by obeying the order of the appellate authority, the petitioner has moved this Court under Article 226 of the Constitution of India for a direction to the respondent Corporation to give effect to the order of the appellate authority and pay his post-retiral benefits as also to quash the order of dismissal as contained in Annexure-‘1’.

SUBMISSION

12. Learned counsel for the petitioner submits that a bare perusal of the charges mentioned in Annexure-1 which have been made basis for dismissal of the petitioner it would appear that those are not in the nature of misconduct and according to him the charges alleging lack of supervision or not taking interest in work, in the facts and circumstances of the present case, would not fall within the category of misconduct as every act of omission would not be an act of misconduct on the part of the petitioner. Reliance has been placed on the judgment of the Hon’ble Supreme Court in the case of Union of India Vs. J. Ahmed reported in (1979) 2 SCC 286=AIR 1979 SC



1022. Learned counsel submits that operation of the buses is done at divisional level and all decisions with respect to the day to day operation are taken by the divisions and, therefore, the allegations against the petitioner that because of his inaction by keeping the vehicles off-root the petitioner has caused loss of revenue to the Corporation has no basis to stand, in course of enquiry such charges have never been proved and in fact there was no allegation that the petitioner had acted with any mala fide intention which led to loss of revenue to the Corporation. The allegations are that there was no improvement in the revenue despite there being directions issued from time to time in monthly meetings. It is the contention of the learned counsel that by no stretch of imagination the charges leveled against the petitioner would fall in the category of misconduct that too for a major punishment such as dismissal from service could have been inflicted upon the petitioner at the fag end of his career.

13. Learned counsel has also submitted that in respect of the employees of the Corporation the Service Rules (CCA Rules 2005) would be applicable. In this regard, he has relied upon a copy of the notification contained in memo no.3404 dated 30th April, 1959 annexed as Annexure-14 to the writ application to submit that by the said notification the then Deputy Secretary to the Government of Bihar intimated inter alia that the State Government Rules relating to



pay, increment, leave traveling allowance and disciplinary control and such other matter as may be suggested from government time to time shall be applied mutatis mutandis not only to the permanent government servants deputed to the Corporation but also to its other employees. He has also relied upon memo no. 1159 dated 02.04.2005 and memo no.6263 dated 17th October, 2007 to submit that other transactions of the respondent authorities with regard to conditions of service i.e. retirement and pay, the rules applicable to the State Government employees i.e. the Bihar Service Code has been made applicable to the employees of the Corporation. Copies of both the notifications annexed as Annexure-15 and 16 to the writ application have been referred to show that the Administrator of the Corporation (respondent no.4) has stated in unequivocal words in the notification as contained in Annexure-15 that Bihar Service Code is applicable in the Corporation. Annexure-16 has also been referred to show that the Administrator of the Corporation (Respondent no.4) has reiterated that like the employees of the Bihar Government, the Bihar Service Code is applicable in respect of the employees of the Corporation.

14. Learned counsel for the petitioner has placed Annexure-17 to the writ application which is an office order no.13322 dated 18th December, 1978 issued under the signature of Special Secretary to the Government, Public Works, Transport and Public



Health Engineering Department (Transport Section) from which it appears that in the case of Sri Jawala Prasad Ambastha the then General Manager when he was dismissed from service by the Administrator of the Corporation vide order no.146 dated 27.01.1978, an appeal preferred by him to the government was considered and the same was allowed by reinstating him in service with a modified punishment.

15. The petitioner has also placed on record a copy of his performance sheet chart from June, 2009 to January, 2010 as Annexure-18 to the writ application and submits that he had been one of the most efficient employees of the Corporation which would be evident from perusal of performance sheet of the Corporation showing that since his joining in Bhagalpur Division with effect from 01.06.2009 he had always maintained his performance within top three performers in the seven divisions of the Corporation. Lastly, learned counsel for the petitioner submits that in any case the punishment of dismissal from service in the facts of the present case has been passed in undue haste without following the established procedure of law, in violation of principles of natural justice and the punishment is highly excessive, arbitrary and bad in law because there was no allegation of any financial misconduct, embezzlement or corruption by this petitioner while discharging his official duty. It is



submitted that the Administrator (respondent no.4) has not only acted with a pre-conceived mind in the matter of conclusion of the departmental proceeding, but has also acted with premeditated mind to punish the petitioner with severe punishment of dismissal which is mala fide in law if not in fact.

SUBMISSION OF THE CORPORATION/RESPONDENT NO.-3

16. A counter affidavit has been filed on behalf of the respondent Corporation. A perusal of the counter affidavit would show that according to the respondents the petitioner had intentionally not submitted his show cause during the departmental proceeding. It is, however, admitted that the petitioner had filed his explanation before the enquiry officer on 01.02.2010 i.e. only four days after 27.01.2010 the date fixed in the matter before the enquiry officer. It is also evident from the statements made in paragraph '8' of the counter affidavit that notice as contained in Annexure-B calling upon the petitioner to appear before the enquiry officer was issued only on 23.01.2010 giving him time till 27.01.2010 to appear and submit his explanation. Again as regards charge-sheet vide memo no.410 dated 19.01.2010 the petitioner was sent notice by the enquiry officer vide memo no.708 dated 15.01.2010 fixing the date of appearance on 22.01.2010. The petitioner filed his reply dated 27.01.2010 before the enquiry officer and thereafter the enquiry officer submitted his



enquiry report dated 04.02.2010 (Annexure-2A) holding him guilty of the charges. Thereafter, the disciplinary authority sent a second show cause notice along with both the enquiry reports to the petitioner vide memo no.1161 dated 15.02.2010 and the petitioner filed his reply to the second show cause on 18.02.2010. The petitioner was called upon to appear before the enquiry officer for the purpose of hearing fixing the date on 22.02.2010, prior to that the petitioner had filed a petition dated 19.02.2010 for casual leave with effect from 20.02.2010 to 22.02.2010 for annual sradh of his wife and this fact was communicated to the enquiry officer by the Divisional Manager, Patna vide his letter no.675 dated 21.02.2010, a copy of which is annexed as Annexure-G to the counter affidavit. On 22.02.2010, the lawyer of the petitioner appeared and prayed for time, a letter sent by speed post addressed to the Administrator was also received by him on 22.02.2010 at 4.30 PM. The enquiry officer however submitted his fresh enquiry report dated 22.02.2010 holding the petitioner guilty of the charges. A copy of the enquiry report dated 22.02.2010 has been enclosed as Annexure-I to the counter affidavit. Thereafter the disciplinary authority passed the office order no.165 as contained in memo no.1417 dated 25.02.2010, vide Annexure-1 to the writ application.

17. On perusal of the counter affidavit, it is apparent



that so far as enquiry report dated 22.02.2010 is concerned, copy of this enquiry report was not sent to the petitioner and only after two days from the date of enquiry report the disciplinary authority passed the impugned order dated 25.02.2010.

18. In the counter affidavit, the respondents have contended inter alia that the Minister, Transport is not the appellate authority to hear an appeal against the order of Administrator, BSRTC. Reliance in this regard has been placed on Annexure-J which is a copy of the order dated 09.03.2004 annexed with the counter affidavit.

19. In course of argument, Sri P.K. Verma, learned senior counsel representing the respondent Corporation submits that on perusal of Annexure-A to the counter affidavit it would appear that one Sri Arun Kumar Thakur the then Divisional Manager was dismissed from service and against the order of dismissal he had preferred an appeal before the Minister of the Department, he had also filed an application before this Court giving rise to CWJC No.1361 of 2003. This Court vide its order dated 05.02.2003 directed the appellate authority to dispose of the appeal within a period of three months. This Court while giving opportunity to the petitioner to pursue his appeal made it clear that this Court would not held that the Minister is the appellate authority and this question was left to be



decided giving opportunity to the appellate authority to go into this question and decide it in accordance with law. The appellate authority at this stage considered that according to Section 62 of the Bihar Re-organization Act, 2000, the Bihar State Road Transport Corporation had become an interstate Corporation and the State of Jharkhand becomes one of the claimants to the properties of the Bihar State Road Transport Corporation. Thereafter, the appellate authority proceeded to consider and analyze the power of the appellate authority against the order of the Administrator of the Corporation taking into consideration the provisions contained under Industrial Disputes Act, 1947 and Industrial Employment Standing Orders Act, 1946. According to him, Bihar State Road Transport Corporation after supersession the Corporation is being administered by the Administrator of the Corporation who exercises his powers under Section 30(2) (b) of the Bihar State Road Transport Act, 1950 to the extent those powers are conferred upon the Board of Directors. The appellate authority referred Rule 25(b) of the Industrial Employment Standing Orders Act, 1946 which reads as under:-

“25(b) There will be right of one appeal by employee in case of an order by the Divisional Manager/Works Manager/Regional Works Manager or any other competent authority subordinate to the Managing Director to the Managing Director or/and



any officer duly authorized in this behalf by the Managing Director and in case of an order passed by the Managing Director to the Chairman, and any order passed by the Chairman to the Corporation.”

20. According to under Section 38(2) (b) of the Road Transport Act, 1950 no appeal is provided against the order of Administrator. The appellate authority held that this does not mean that no appeal remedy is available against the order of the Corporation. According to him, disputes in this regard may be raised in terms of Section 2(K) and Section 2(A) under the Industrial Disputes Act, 1947 and further in terms of Section 13-A of the Industrial Employment Standing Orders Act, 1946 also industrial disputes may be raised in the Labour Courts, but no appeal would lie before the Minister of the Department.

21. In course of hearing, a supplementary counter affidavit has been brought on record. This affidavit has been filed in compliance of the order of this Court on the request of the learned senior counsel for the Corporation who wanted some time to bring on record certain important documents. In the supplementary counter affidavit it is submitted that the charge-sheet served on the petitioner in the disciplinary proceeding dated 08.02.2010 as contained in Annexure-A to the previous counter affidavit discloses the



misconduct of negligence in duty and lack of supervision due to fall in income per kilometer of the buses operated from Division and also due to high percentage of Corporation buses remaining off road and not in operation pertaining to the Division. It is stated that regarding shortcoming even warning had been given to the petitioner who was posted as in-charge Divisional Manager of Bhagalpur Division vide memo no.4958 dated 30.12.2009.

22. It is further submitted that the Corporation is an industrial establishment within the meaning of Industrial Disputes Act and Industrial Employment (Standing Order) Act 1946 is applicable. In consonance with the provisions of the said Act a separate standing order has been framed and certified by order no.518 of 1986 dated 31.01.1996. Order no.21 enumerates the acts and omission on the part of the employee of the Corporation which shall amount to misconduct. Serial No.12 of the said order enumerates “negligence of duty resulting in loss to the Corporation” as one of the misconduct. A Xerox copy of the certified standing orders for the BSRTC has been brought on record as Annexure-L to the counter affidavit. In the supplementary counter affidavit it is also stated as to how the Corporation had been under acute financial crisis and had virtually on the verge of closure leading to accumulation of arrears of a huge amount of retiral dues and salary of the employees. Developments in



this regard have been pointed out to submit that in the circumstances, the management of the Corporation was superseded by the Government by notification under Section 34 of the Road Transport Act and Administrator was nominated by the Government to exercise the power of the Board of Directors.

23. Mr. P.K. Verma, learned senior counsel representing the respondent Corporation at the end of his argument has submitted that whether the Bihar Civil Services (Classification, Control and Appeal) Rules, 2005 would apply to an employee of the respondent Corporation and as such the Minister, Department of Transport, Government of Bihar would have acted as an appellate authority in the facts and circumstances of this case may not be required to be gone into in the present case because the petitioner has also challenged Annexure-1 to the writ application which is the order of punishment passed by the Administrator and in that view of the matter this Court may test the legality and validity of the order as contained in Annexure-1 itself.

24. Petitioner has also filed rejoinder to the counter affidavit. It is submitted that in respect of the memorandum of charges dated 08.01.2010 the enquiry officer has submitted his enquiry report prior to the submission of the show cause reply by the petitioner. However, so far as the charge with regard to alleged



downfall in the income of the Corporation in December, 2009 to Rs.14.64 per effective kilometer which according to the Corporation was less than Rs.18.37 per effective kilometer of December, 2008 is concerned, the charge itself was baseless inasmuch as it was not disclosed as to how many buses had been operational in December, 2008 and what was the average income and similarly it was also not disclosed as to how the effective kilometer income of the Corporation had been calculated for December, 2009. It is the case of the petitioner that neither the details of number of buses which were operational then was disclosed and in fact as per the data received from the different places the headquarter of the Corporation itself prepared a comparative chart and the division of the petitioner was found to have second highest income in July, 2009. It is further contended that the income of the division of the petitioner was one of the highest in the other months of the year 2009 and for January, 2009. These factual replies of the petitioner in reply to the charges have been mentioned in paragraph 3 of the rejoinder of the petitioner in response to paragraph 6 to 11 of the counter affidavit under reply. It is the submission of the learned counsel that findings of guilty recorded by the enquiry officer and the order of punishment passed by the disciplinary authority are perverse and those are against the material available on the record and hence not sustainable in the eyes of law. Learned counsel has also



pointed out that from the order of the appellate authority (Annexure-12) it would appear that the Administrator of the respondent Corporation was issued notice to appear in the proceeding on 19.03.2010, 26.03.2010, 05.04.2010 and 13.04.2010, but neither the Administrator of the Corporation nor his authorized representative appeared for taking part in the appeal proceeding. It is thus submitted that if the Administrator of the Corporation chose not to appear, the appellate authority cannot be blamed for deciding the appeal in absence of the Administrator/Corporation.

25. Learned counsel has submitted that the Administrator of the Corporation was also holding the post of Secretary of the Transport Department and in view of the factual position where the Administrator of the Corporation had passed the order of punishment, in terms of Rule 24 of the Service Rules where the person who made the order appealed against becomes by virtue of his subsequent appointment or otherwise, the appellate authority in respect of such order, an appeal against such order shall lie to the authority to which such person is immediately subordinate or to an authority especially authorized for this purpose by the Government. The State government vide Resolution as contained in memo no.1025 dated 28.03.2007 issued through its Personnel and Administrative Reforms Department (now General Administration Department) has



provided that in case of order of punishment having been passed by the Departmental Commissioner and Secretary, the Departmental Minister would be the appellate authority and, therefore, in the present case, since the authority who passed the order of punishment was holding the post of Secretary, Department of Transport/Transport Commissioner the Departmental Commissioner became the appellate authority and the appellate authority has passed an order as contained in Annexure-12 only after considering the factual and legal position.

26. The case of Sri Arun Kumar Thakur has been sought to be distinguished by the petitioner by submitting that when order dated 09.03.2004 was passed, the Service Rules 2005 and the resolution of the State Government issued in terms of Rule 24 thereof was not in existence. It is further submitted that the petitioner being a Divisional Manager of the Corporation at the relevant time and holding a supervisory post cannot be held to be a workman under the provisions of the Industrial Disputes Act, 1947. Submission of the Corporation in this regard has been sought to be discarded by submitting that stand taken by the Corporation is totally misplaced. The petitioner has brought on record different orders passed by the Administrator of the Corporation between the year 2005 and 2007 vide Annexure-20 and 21 respectively to support his contention that Service Rules, 2005 would be fully applicable in respect of the



employees of the Corporation as well.

CONSIDERATION

27. Having heard learned counsel for the petitioner and learned senior counsel representing the Corporation, I am of the considered opinion that so far as the Industrial Employment (Standing Order) is concerned, the same would be applicable to a workman. In the present case, it has been pleaded on behalf of the petitioner that he was working on a supervisory post taking remuneration of more than Rs.1600/- and therefore he would not come within the meaning of 'workman' as defined under Section 2(K) of the Industrial Disputes Act, 1947. On the other hand the respondent Corporation has submitted that the petitioner would be covered under Standing Order. Neither the petitioner nor the respondent Corporation has brought on record sufficient materials as regards the nature of the duties and power of the petitioner who was designated as Divisional Manager. It is well settled by a catena of decisions of the Hon'ble Supreme Court in the cases such as **Devinder Singh Vs. Municipal Council, Sanaur** reported in (2011) 6 SCC 584 and **H.R. Adyanthaya and Ors. Vs. Sandoz (India) Ltd. and Ors.** reported in (1994) 5 SCC 737 that purposive approach should be adopted while interpreting the term workman under the Industrial Disputes Act. The emphasis is given on the nature of duties and powers conferred on an employee rather than



the designation. A bare perusal of the sub-section(3) of Section 1 of the Industrial Employment (Standing Order) Act, 1946 it would appear that this Act applies to every industrial establishment wherein hundred or more workmen are employed or were employed on any day of the preceding twelve months. Thus, in order to cover the petitioner under the definition of workman and to apply the Industrial Employment (Standing Order) it would be necessary to find out his nature of duties and powers. Since there are not enough materials on the record to go into this aspect of the matter, I refrain myself in dwelling upon this issue.

28. Learned counsel for the petitioner has brought on record certain materials in form of Annexure-15, 16 and 17 to the writ application to show that it has been the stand of the Administrator of the Corporation in past that the Bihar Service Code as applicable to the government employees is also applicable to the employees of the respondent Corporation and the same benefits as have been made applicable to the government employees have been made applicable in the Corporation. In the counter affidavit of respondent Corporation these facts have not been denied which are apparent from Annexure-15, 16 and 17 of the writ application rather the stand of the Corporation in paragraph 31 of the counter affidavit is that in the case of Arun Kumar Thakur who was also a Divisional Manager the then



Minister, Transport had refused to entertain the appeal holding that as per sub-section (2B) of Section 30 of Road Transport Act, there is no provision of appeal against the order of Administrator and he held that the Minister, Transport is not the appellate authority. I have already discussed Annexure-J to the counter affidavit which is the order passed by the then Minister in the case of Arun Kumar Thakur. From Annexure-J it appears that the then Minister relied upon Rule 25(b) of the Standing Order issued under Industrial Employment (Standing Order) Act, 1946 and took a view that Sri Thakur may challenge the action of the Administrator before the Labour Court in terms of the Standing Order. In the said case neither it was pleaded nor decided by the Minister, Transport as to that the Standing Order would be applicable only to a 'workman' and not to each and every employee of the respondent Corporation. As has been held hereinabove, since there are no material to take into consideration the nature of duties and power of the petitioner to hold and declare that he would not be covered under the definition of workman or otherwise, I am not going into that aspect of the matter and since question as to the applicability of the provisions of Bihar Civil Services (Classification, Control and Appeal) Rules, 2005 depends upon a finding as to whether or not the petitioner would be outside the purview of definition of workman, I feel it just and proper not to decide this question as to the applicability



of the Bihar Civil Services (Classification, Control and Appeal) Rules, 2005 in respect of the petitioner and this question is left open for consideration in an appropriate proceeding.

29. Now coming to the order of dismissal as contained in Annexure-1 to the writ application, I find that the charges on the basis of which the petitioner has been dismissed from service are in the nature of his poor performance in achieving the income. It is alleged that income per kilometer received in December, 2009 was much less than the income of the month of December, 2008. It is stated that in December, 2008 the income per kilometer was Rs.18.37 whereas in December, 2009 it got reduced to Rs.14.64 per kilometer. It is further alleged that in the first six months of January, 2008 the income got reduced to Rs.14.12 per kilometer whereas in January, 2009 per kilometer income of Bhagalpur Division was Rs.18.01. It further says that loss of income was because in Bhagalpur Division the on road vehicles were less as 76% vehicles were running off road and because of this off road vehicles the income was reduced. The petitioner was directed in the monthly meetings in this regard, but no improvement takes place.

30. Apart from the above there is one more charge against the petitioner that he had not done the settlement of Sultanganj bus stand on the occasion of Shravani Mela which led to huge financial



loss to the respondent Corporation. Let it be recorded that petitioner was due to retire on 28.02.2010 only. For the first time the petitioner was called upon to furnish his explanation to the charges as contained in charge-sheet dated 8.1.2010 (Annexure-A to the counter affidavit). Vide letter dated 23.01.2010 issued by the enquiry officer he was asked to submit his explanation against the charges, prior to issuance of charge-sheet dated 8.1.2010, the petitioner was not even called upon to submit an explanation by way of a show cause. The charge-sheet nowhere talks of commission of any act or omission in the nature of any financial irregularity or illegality, charge-sheet only says that because of negligent approach of the petitioner towards his duties, he has sabotage the interest of the Corporation and by not taking interest in the work and due to lack of supervision the Corporation has suffered monetary loss.

31. The loss suffered by the Corporation has not been assessed and no documentary evidence of any kind was enclosed with the charge-sheet. The charge-sheet says that Sri R.P. Mahto Departmental Officer on Special Duty has been appointed as enquiry officer. The enquiry officer issued notice to the petitioner on 23.01.2010 giving only four days time to submit his reply. For the reasons stated by the petitioner which have been taken note of hereinabove, the petitioner submitted his reply on 1.2.2010, but Sri



R.B. Mahto, the enquiry officer had already submitted an enquiry report on 30.01.2010 itself. The management did not adduce any evidence either documentary or oral to prove charges against the petitioner. A perusal of the enquiry report would show that since the petitioner had failed to submit his explanation to the charges, the enquiry officer assumed that the charges against the petitioner are proved. On behalf of the Management a comparative chart of the income of the month of December, 2009 and December, 2008 were produced to show that there had been decrease in per kilometer income. This comparative charge which was produced on behalf of the Management was not made available to the petitioner with the charge-sheet. The management did not place the comparative income of other Division during the same period. It has been assumed that decrease in income per kilometer during the relevant period is enough to prove that the petitioner had committed misconduct. It is evident from the records that the enquiry officer and the disciplinary authority both were acting with a premeditated mind to pass an order in haste and for that reason they were not willing to comply with the mandatory procedures such as supply of the document and proper opportunity of hearing to the petitioner.

32. As regards the charge that the petitioner had not settled the land of the bus-stand lying vacant for Shravani Mela, the



petitioner had submitted his reply vide letter no.242 dated 27.01.2010 and had brought it on record that vide memo no.1204 dated 3.7.2009 and memo no.1432 dated 29.07.2009 he had informed the headquarter that one person is willing to take the land for Shravani Mela on payment of Rs.1,50,000/-, a guideline was sought for but it was never received. He had also stated that the advertisement inviting applications from willing person to take the settlement of the vacant land was published in two newspapers namely Dainik Samachar and Hindustan. The petitioner had assumed charge of the post of Divisional Manager only on 6.1.2009. The land was earlier settled in the year 2005 for a sum of Rs.1,65,000/-. Here it is apparent that this petitioner had joined as Divisional Manager lastly on 1.6.2009 as stated by him in his letter (Annexure-3 to the writ application). It is not denied that he had published advertisement inviting application and had written two letters on 3.7.2009 and 29.7.2009 to the headquarter which remained unreplied. He has given reasons as to why more people were not willing to take the vacant land for Shravani Mela because pursuant to the extension of railway station in the year 2009 Sultangan railway station had gone in opposite direction towards half kilometer and a new railway station had already been inaugurated well before start of 2009 Shravani Mela.

33. In the enquiry report (Annexure-2 A) as regards this



charge there is no denial of the fact that the petitioner had joined as Divisional Manager only on 6.1.2009, he had published advertisement in the newspaper and had also sought for guidelines from the headquarter when he found no person was willing to take vacant land and only one person had shown inclination to take the vacant land for 'Mela' on the payment of Rs.1,50,000/-. According to enquiry officer the vacant land was settled in the year 2008 at Rs.2,50,000/- for one month and therefore Corporation has suffered loss due to non-settlement. The Management did not submit any reply or evidence to demonstrate as to why despite their being two letters written by this petitioner to headquarter no reply was sent to him. The persons responsible at the headquarter to send the guidelines have not been proceeded against but this petitioner has been held guilty of acting negligently in the matter of settlement of vacant land and thereby causing loss. From the record it appears that as regards second charge also no evidence was led on behalf of the management. It is evident that the management and the headquarter was not serious about the settlement of the land at Sultanganj otherwise those who were responsible to reply the letters of the petitioner could have taken it seriously and the loss if any caused to the respondent Corporation could have been saved or reduced. This Court is unable to understand as to why on the apparent and evident facts the enquiry officer would



have presumed that the petitioner was guilty of causing monetary loss to the Corporation.

34. This Court is conscious of the settled legal proposition that sitting in its writ jurisdiction it would not appreciate the evidences which are on the record or shall take a view against the view taken by the enquiry officer only because two opinions may be formed in the facts of the matter but in the facts of this case and on a bare perusal of the materials available on the record this Court finds that the opinion and findings of the enquiry officer are perverted, not based on the materials available on the record and this perversity has occasioned only because the enquiry officer was acting in hot haste and had decided to punish the petitioner by recording a finding of guilty without giving him proper opportunity to defend himself. The Management did not adduce any oral or documentary evidence to prove the charges but it appears that the enquiry officer was acting as representative of the Corporation and took a view on the basis of the letters and documents which were in the files, copies of which were never made available to the petitioner.

35. If the speed with which the enquiry officer proceeded to submit his enquiry reports dated 30.01.2010 and 04.02.2010 is taken into consideration it would appear that within one week from the date of submission of the show cause by the petitioner the enquiry



reports were submitted without fixing any date to adduce evidence by the parties or to hear them.

36. It is also proved from the materials available on the record that vide letter dated 15.2.2010 the petitioner was made available copy of the two report dated 30.01.2010 and 4.2.2010 respectively, the petitioner submitted his reply dated 18.02.2010 immediately to the Administrator vide Annexure-‘F’ to the counter affidavit. The petitioner submitted that he has not been given appropriate opportunity to place his case in the departmental proceeding. He was never called upon to participate in the enquiry, no date was fixed for the said purpose and no information in this regard was ever sent to him. He also submitted that Sri Ram Prasad Mahto the enquiry officer belongs to the same cadre and he has been biased to him and has always tried to harass him therefore, the enquiry should be conducted through any other enquiry officer of higher cadre and the petitioner should be given an opportunity to examine the witnesses and cross-examine so that he can get justice.

37. It is evident that on receipt of the reply dated 18.2.2010 written by the petitioner (Annexure-F to the counter affidavit), the Administrator did not proceed on the basis of the enquiry reports dated 30.01.2010 and 04.02.2010 respectively. The file was once again sent to the enquiry officer who once again prepared an enquiry



report dated 22.2.2010. Prior to preparing the fresh enquiry report the enquiry officer in order to filling the gap sent memo no.178 dated 20.02.2010 calling upon the petitioner to participate in the enquiry which was received on 22.2.2010. The petitioner had requested for leave between 20.02.2010 to 22.02.2010 to perform the annual shradh of his wife and had sent a letter through speed post to the Administrator. The enquiry officer sent a fresh enquiry report to the Administrator on 22.02.2010 and after two days the Administrator passed the order of dismissal as contained in Annexure-‘1’ to the writ application even as copy of fresh enquiry report was not sent to the petitioner.

38. Even though I am not going into the question as to whether the Departmental Minister was competent to hear appeal against the order of dismissal or not, but I must take into consideration the conduct of the respondent Corporation. When the appeal notice was served on the Corporation and several dates were fixed, the Corporation did not appear before the Departmental Minister and no step whatsoever was taken by the Corporation. The objection which is being raised at this stage should have been raised at the outset and the question whether the minister was competent to hear appeal or not could have been considered. A public sector undertaking like the respondent Corporation acting through its Administrator who



happened to be an officer of Indian Administrative Cadre cannot be supposed to keep quiet, wait for an order to be passed by the Minister, and then not to implement the order and when the petitioner moved this Court then only take a plea of jurisdiction or authority by way of defence. This conduct of the respondent Corporation clearly shows that not only the matters relating to departmental proceeding against the petitioner was conducted in hot haste but even thereafter the respondent Corporation did not cooperate in the matter of disposal of the appeal preferred by the petitioner before the Departmental Minister. A timely appearance before the Departmental Minister and submission of its stand would have resolved the issues at the threshold, but that was not done. Let it be recorded in the counter affidavit that it is not the stand of the respondent Corporation that they were not aware of the appeal preferred by the petitioner.

39. Considering this aspect of the matter and the fact that the writ application has remained pending consideration before this Court for almost 7 years it became all the more necessary for this Court to consider the entire materials available on the record in order to do complete justice.

40. It is an admitted position that final enquiry report dated 22.02.2010 was never issued much less served upon the petitioner and the order of dismissal was passed by the Administrator on 25.02.2010



without giving any opportunity to the petitioner to revert on the final enquiry report.

41. In the case of **Union of India Vs. J. Ahmed** reported in **(1979) 2 SCC 286**, the Hon'ble Supreme Court had occasion to consider a somewhat similar matter where the delinquent officer was being proceeded for the charges that he completely failed to take any effective preventive measures against widespread disturbances in spite of adequate warning being conveyed, that he showed complete lack of leadership and had failed to give proper direction to his subordinate, he did not personally visit the scenes of disturbances and had not exercised necessary supervision, he had showed complete ineptitude, lack of foresight, lack of firmness and capacity to take quick and firm decision. The Hon'ble Apex Court glanced over the charges leveled against the respondent J. Ahmed in the said case and in paragraph 9 of the judgment held inter alia as under:-

“The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight



and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.”

42. While considering the question as to what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty, the Hon’ble Supreme Court further held in paragraph 11 of the judgment in the case of **J. Ahmed (supra)** as under:-

“It would follow that conduct which is blameworthy for the government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see Pierce v. Foster¹). A disregard of an essential condition of the contract of service may constitute misconduct [see Laws v. London Chronicle (Indicator Newspapers²)]. This view was adopted in Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur³, and Satubha K. Vaghela v. Moosa Raza⁴. The High Court has noted the definition of misconduct in Stroud’s Judicial Dictionary which runs as under:

Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct.”

1.17 Q B 536, 542

2. (1959) 1 WLR 698

3. 61 Bom LR 1596

4. 10 Guj LR 23



43. The petitioner has brought on record a copy of the reply which he had submitted with regard to the first charge of having earned lesser income during the relevant period. He has categorically stated that from the chart prepared by Headquarter in July, 2009 it would appear that the petitioner had secured 2nd position in comparison of total income of all the divisions. In August, he had secured first position, in September he was placed at third position, but in the October, 2009 and November, 2009 he was again placed at second position. In December, 2009 and January, 2010 he had secured first position and for that he was also rewarded. This Court is unable to understand as to how in absence of any denial of this fact the petitioner would have been proceeded against and dismissed from service that too without following the procedures required to be followed in the matter of a departmental proceeding. When the Management charged him for having lesser income in the month of December, 2009 and in first few days of January, 2010, on the face of it I am of the opinion that this was a mere pretext to proceed against the petitioner. Petitioner has specifically pleaded in this regard in paragraph 38 of the writ application also stating that he had been most efficient employee of the Corporation which would be evident from the performance-sheet since the date of his joining on 6.1.2009. He has stated that he had always kept his performance within top three



performers of the 7 divisions. The respondent Corporation in its counter affidavit as well as in the supplementary counter affidavit did not deny this fact. These were the matters within the knowledge of the Corporation. The Corporation did not bring any materials on these aspects of the matter before the enquiry officer.

44. On the face of the materials available on the record, I find that the entire departmental enquiry was initiated at the fag end of petitioner's service when he was going to retire within two months.

45. The charges on the face of it do not constitute any misconduct, however the enquiry officer proceeded with a premeditated mind to submit enquiry report even though on behalf of the Management no evidence was led either oral or documentary to prove that the petitioner has committed any act or omission which may constitute misconduct. A mere comparative decrease in the income per kilometer in one or two months cannot be a basis to allege against the petitioner that he was guilty of causing monetary loss to the Corporation. In such cases where due to failure to achieve target an employee is proceeded against and it is alleged that the employer has suffered loss due to poor performance of the employee, the employer is under an obligation to prove that standard fixed by him was realistically achievable and whether other employees have been able to achieve the standard.



46. In this case, the petitioner has specifically submitted in his reply and it is his consistent stand that he was within top three performers in the seven divisions of the respondent Corporation. In the opinion of this Court the departmental proceeding initiated against the petitioner itself found to be bad and further non-observance of the mandatory procedures in consonance with principles of natural justice the entire proceeding is held vitiated and the same is liable to be quashed. Taking into consideration the various issues, which have been discussed hereinabove, since I have held that very initiation of the disciplinary proceeding on the basis of the charges as alleged was result of a decision taken in hot haste and subsequent to initiation of the departmental proceeding both the enquiry officer and the disciplinary authority were in haste to conclude the same by punishing the petitioner so much so that the final inquiry report dated 22.02.2010 was not sent to the petitioner and the order of dismissal was passed on 25.02.2010. This Court is also unable to appreciate as to how in the given facts of the case where there is no allegation of financial irregularity or involvement of the petitioner in any act of corruption while in service such a serious punishment of dismissal from service would have been imposed against him. Here this Court also find that the order of dismissal was passed in complete disregard to the established procedure of law, without there being any material



and evidence and further severe punishment of dismissal from service is also against the proportionality of the punishment.

47. In result the order of the dismissal as contained in Annexure-1 as well as the charge-sheet are hereby quashed. The petitioner would be treated to have retired from service with effect from 28.02.2010 and shall be paid all consequential benefits along with statutory interest within one month from the date of receipt/production of a certified copy of this order.

48. The writ application is allowed to the extent indicated above.

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	AFR
CAV DATE	25.01.2018
Uploading Date	14.04.2018
Transmission Date	N/A

