IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.318 of 2021

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Santosh Kumar Son of Late Laxmi Narayan Singh Resident of Gram Anandibag, P.O.- Karpi, P.S.- Karpi, District- Arwal, Bihar, Pin Code- 804419.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar, Patna.
2. The Principal Secretary, Department of Revenue and Land Reforms, Govt. of Bihar, Patna.
3. The Commissioner, Magadh Division, Gaya cum Appellate Authority.
4. The District Officer, Jehanabad, P.O.- Jehanabad, District- Jehanabad -cum- Disciplinary Authority.
5. The Deputy Collector, In-charge Establishment, Section, Collectoriate, Jehanabad.
6. The Additional Collector cum Enquiry Officer, Jehanabad, District- Jehanabad.

... ... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ghanshyam Sharma, Advocate

For the State : Mr. Khurshid Alam, AAG-12

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CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date : 12-09-2023

Heard learned counsel for the petitioner and learned counsel for the State.

2. By the instant writ proceedings, the petitioner has put to challenge the communication dated 11-12-2014, issued by

the District Magistrate, Jehanabad (Respondent No.4), as contained in Annexure-6 to the writ petition, being an order of major penalty, issued under Rule 14(ix) of the Bihar Government Servants (Classification, Control and Appeal) Rules, 2005 (for brevity 'CCA Rules 2005'). The petitioner has also sought quashing of order dated 10.06.2020 (Annexure-10), whereby and whereunder the Appellate Authority i.e., the Commissioner, Magadh Division, Gaya (Respondent No.3) has dismissed the petitioner's Service Appeal No. 99 of 2015 and also for consequential direction of his reinstatement.

3. The brief background is that the petitioner was posted as a Revenue Karmchari, when he has been served with charge memo under communication dated 26.04.2013 (Annexure-1), issued by the Respondent No.4. The charge memo, contains four charges.

(i) The first charge is alleged unauthorized absence since 28-09-2012 hampering timely disposal of Government work.

(ii) The second charge is that he has not handed over charge/inventory.

(iii) He has also not given the accounts in respect of revenue collection done by him.

(iv) The fourth and last charge was violation of government orders since he was not giving any reply to the show cause asked from him by the office.

4. The petitioner has submitted his reply dated 07-12-2013 (Annexure-2) to the charge memo, stating that he was absent on account of illness. He claims to have been suffering with Jaundice (Hepatitis). He also claims to have joined back on his duties on 02-01-2013, but has been denied salary thereafter.

5. From the petitioner's reply to the show cause (Annexure-2), it is apparent that he has responded to the charge memo after 8 months, i.e., on 07.12.2013. The reply is limited to the first charge of petitioner's unauthorized absence from duty. Insofar as the allegation of not submitting the accounts; in his reply, the petitioner has stated that the entire accounts are in his room in which he was a tenant. Due to non- payment of salary for the past several months, he had to vacate the room, wherein, the accounts were kept. He has also stated in his reply to the charge memo that he got his son's admission done in some diploma course at Ranchi. He, therefore could not appear earlier in the proceedings. The petitioner has, thus, tried to justify his unauthorized absence as well as the delay of nearly 08 months in submitting his reply to the charge memo dated

26-04-2013 (Annexure-1).

6. The Enquiry Officer has found the charges to be proved. The Enquiry Report dated 05-02-2014 (Annexure-3), takes note of the fact that the petitioner has not denied or responded to the 2nd, 3rd and 4th charge. Insofar as the first charge is concerned, the absence is admitted, but justified by the petitioner as noted above. The Enquiry officer has found the charges to be proved. The petitioner, thereafter, has been served with a second show cause notice and two reminders dated 08-03-2014 and 24-04-2014. Thereafter, on 05-09-2014, again he has been asked to submit his reply to the second show cause notice.

7. The petitioner's reply to the second show cause notice is dated 15-09-2014 (Annexure-5). In his reply to the second show cause notice, he has specifically admitted to the unauthorized absence since 28-09-2012, but on account of his illness. He claims that his application dated 09-10-2012 was not received by the Circle Officer, but there is no averments that he has made any efforts to submit the application through post or otherwise. Even in his reply to the second show cause notice, the petitioner has not specifically denied the 2nd, 3rd and 4th charge.

8. The Disciplinary Authority, thereafter, has held the charges to be proved and awarded the petitioner the punishment of compulsory retirement under Rule 14(ix) of the Bihar CCA Rules, 2005. The order of punishment of compulsory retirement is dated 11-12-2014. The petitioner has preferred an appeal against the order of punishment of compulsory retirement, before the Divisional Commissioner, Magadh Division, Gaya (Respondent No.3). Finding the appeal to be belated, the same was dismissed. The petitioner, thereafter, moved this Court in CWJC No. 858 of 2016. After due consideration, this Court disposed of the writ application as follows:-

> “ *8. For the reasons indicated herein above, this Court would observe that the Appellate Authority should consider the petitioner's appeal on merits and dispose it off by a reasoned and speaking order in accordance law. The entire exercise should be completed within a period of three months from the date of receipt/production of a copy of this order.*
> *9. Writ petition is disposed off.*”

9. The petitioner's appeal, thereafter, has been considered by the Respondent No.3 and rejected by order dated 10-06-2020 (Annexure-10).

10. The learned counsel for the petitioner submits that no evidence or witness was produced in the enquiry proceedings before the Enquiry Officer. The Presenting Officer was a mute

spectator and for these two grounds, the Enquiry Report is unsustainable. It is further submitted that the order of punishment passed by the Respondent No.4 is also unsustainable because he takes into consideration the petitioner's continued absence even after the charge memo was issued, for the purpose of arriving at a conclusion in the enquiry. The period after the issuance of charge memo did not form part of the allegation in the charge memo, reliance placed on this period, therefore, is clearly unsustainable. The Respondent No.4 did not enclose copy of the enquiry report with the 2nd show cause notice. Non-supply of copy of enquiry report is a major procedural lapse. The findings of the disciplinary authority, therefore, based on an enquiry report, without supplying copy of the same to the petitioner, is violative of principles of natural justice and, thus, unsustainable. Lastly, it is submitted that the punishment is grossly disproportionate to the charges. The petitioner's normal date of superannuation is 31.05.2030. On account of the order of punishment, the petitioner has been made to compulsorily retire six years prior to his date of superannuation for charges alleging absence for about six months. The order of punishment, therefore, is disproportionate to the gravity of the charges alleged against the petitioner.

11. The learned State counsel, on the other hand, submits that the petitioner's absence during the period alleged in the charge memo is not denied or disputed by him in the enquiry. The absence, therefore, was not required to be proved. His plea of having submitted joining on 02.01.2013, is also without any basis. Therefore, the petitioner cannot contend that the fact of his unauthorized absence has not been established, as the same was admitted.

12. Insofar as the reasons assigned by the petitioner justifying his unauthorized absence, based on his illness, there is no medical/pathological report substantiating the illness Jaundice (Hepatitis). Only certificates said to have been issued by private doctors have been produced. Petitioner also has not requested to produce the doctor in the enquiry to substantiate his claim.

13. Insofar as the 2nd, 3rd and 4th charges are concerned, there being no denial of the charges in the petitioner's reply to the charge memo, it does not lie in the mouth of the petitioner now to contend that the same were not proved.

14. The submission regarding non- supply of enquiry report also is unsustainable. The petitioner has never raised this issue either at the time of submitting his reply to the second

show cause notice or in his appeal filed before the Appellate Authority. In fact, he has filed his reply to the 2^{nd} show cause notice and it is not his case that non-supply of enquiry report has caused any prejudice to the petitioner in submitting his reply to the second show cause notice.

15. The petitioner's unauthorized absence, non-submission of accounts in respect of the revenue collection done by him and loss occasioned thereby; as also the causal manner, in which he has responded to the charge memo and 2^{nd} show cause notice after months, depicts very irresponsible behaviour of the petitioner unbecoming of a government servant carrying revenue responsibility. The petitioner, therefore, deserves the punishment of compulsory retirement from service and the order of punishment is commensurate to the gravity of allegation. The submission of the Presenting Officer have also been recorded in the enquiry report. The petitioner’s allegation that the Presenting Officer was a mute spectator, therefore, is factually unsustainable.

16. On a consideration of the rival submissions and material on record, this Court would find that the petitioner has not denied, disputed or responded to the 2^{nd}, 3^{rd} and 4^{th} charges in the charge memo. The submissions with respect to the order

of punishment in respect of the 2nd, 3rd and 4th charges, therefore, is clearly unsustainable as in spite of opportunity, the petitioner has chosen not to respond to, or deny these charges. He, therefore, is estopped from contending that these charges were not proved or that the findings in respect of these charges are not sustainable for non-compliance with principles of natural justice implicit in the procedural requirement, which have been violated. In such event, the plea of principle of natural justice is deemed to have been waived. As petitioner has not shown that any prejudice was caused to him to sustain a complaint of non-compliance with principles of natural justice. In this connection, this Court would refer to the decision of the Apex Court in the case of ***Board of Directors, Himachal Pradesh Transport Corporation & Anr. Vs. K.C. Rahi*** reported in ***(2008)11 SCC 502,*** wherein, under similar circumstance, it was held that natural justice cannot be put in a straitjacket formula. Insofar as the charge of petitioner's unauthorized absence is concerned, the petitioner specifically has admitted to unauthorized absence, but only for a part of entire period alleged in the charge memo i.e., up to 02-01-2013. The justification for unauthorized absence is untenable on the face of it. The same was, thus, not required to be proved in the enquiry. The petitioner's plea regarding illness, this Court would find that it is not founded on any medical report. In support of his condition of suffering with Jaundice (Hepatitis), merely by submitting certificates issued by the private doctors, the petitioner's plea cannot be accepted.

17. Petitioner’s plea regarding submission of joining on 02-01-2013, is also unacceptable. There is nothing on record to show that he made any efforts to submit his joining. Even if the same was denied by the Circle Officer, there is nothing to show that he has made any effort either by making a complaint before the Superior Authority, or by forwarding his joining through post.

18. Insofar as the plea of non-submission of copy of the enquiry report, it is apparent from records that no such objection has been raised by the petitioner either while submitting his reply to the 2nd show cause notice or in the appeal, preferred by him against the order of punishment. It is not the petitioner's case that any prejudice has been caused by non-supply of copy of the enquiry report. This fact is evident from bare perusal of petitioner’s reply to the second show cause notice (Annexure-5), his appeal (Annexure-9) as well as the supplementary affidavit filed in the petitioner’s appeal (also part of Annexure-9 to the

writ petition). The petitioner has submitted his reply to the 2nd show cause notice and filed his appeal and supplementary affidavit without raising any prejudice being caused by non-supply of copy of the enquiry report. Now, in these proceedings, for the first time, such plea has been taken. Even in these proceeding, the pleas has been taken without specifying any prejudice being caused by non-supply of enquiry report.

19. Insofar as petitioner's plea regarding non-compliance with the mandatory procedure for supplying copy of enquiry report, this Court would observe that the law in this regard is by now settled that a Statute or Rule may contain substantive provisions and procedural provisions. The substantive provisions must be strictly complied with. For such provisions, theory of substantial compliance may not be available. In respect of some procedural provisions, however, it is possible to apply the theory of substantial compliance or the test of prejudice, as the case may be (refer: ***State of U.P. vs. Harendra Arora & Anr.*** reported in ***2001(6) SCC 392***).The Hon'ble Apex Court has, thus, held in paragraph Nos. 23 and 24, as follows:-

> **"23.** *Thus, from a conspectus of the aforesaid decisions and different provisions of law noticed, we hold that the provision in Rule 55-A of the Rules for furnishing a copy of enquiry report is a procedural one and of a mandatory character, but even*

then a delinquent has to show that he has been prejudiced by its non-observance and consequently the law laid down by the Constitution Bench in the case of ECIL to the effect that an order passed in a disciplinary proceeding cannot ipso facto be quashed merely because a copy of the enquiry report has not been furnished to the delinquent officer, but he is obliged to show that by non-furnishing of such a report he has been prejudiced, would apply even to cases where there is requirement of furnishing a copy of enquiry report under the statutory provisions and/or service rules.

24. *Turning now to the facts of the case on hand, it has to be seen whether by non-furnishing of the enquiry report the delinquent officer has suffered any prejudice. Undisputedly, after submission of enquiry report the State Government sent a show-cause notice to the delinquent pursuant to which he had shown cause and the disciplinary authority after considering the said show-cause reply, passed the order of dismissal. It is not the stand of the respondent that in the absence of the enquiry report he could not submit an effective show-cause reply before the order of dismissal was passed. Neither from the order passed by the Tribunal nor the High Court would it appear that the respondent had raised this point there that he could not file an effective show-cause reply in the absence of enquiry report nor has it been stated that in the show-cause reply it was complained that the delinquent had not been served with a copy of the enquiry report. From these facts, it is not possible to hold that the respondent has been prejudiced by non-furnishing of enquiry report."*

20. The decision has recently been relied upon in the case

of ***T. Takano vs. Securities and Exchange Board of India & Anr.*** reported in ***(2022) 8 SCC 162***, in paragraph no. 48, which reads as follows:-

> "**48.** *In State of U.P. v. Ramesh Chandra Mangalik, it was held that the duty to disclose is confined only to material and relevant documents which may have been relied upon in support of the charges. In that case, the personal file of other officers was not supplied to the delinquent officer. It was noted that such documents have not been relied upon by the enquiry officer. The delinquent officer was not able to prove the relevance of the documents that were suppressed. This Court observed : (SCC pp. 448-49, para 11)*
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> *"11. The learned counsel for the appellant has further submitted that particular documents, copies of which are said to have not been supplied are not indicated by the respondent, much less in the order of the High Court nor has their relevance been pointed out. The submission is that the delinquent will also have to show as to in what manner any particular document was relevant in connection with the inquiry and what prejudice was caused to him by non-furnishing of a copy of the document. In support of this contention, reliance has been placed upon a case reported in Chandrama Tewari v. Union of India . It has been observed in this case that the obligation to supply copies of documents is confined only to material and relevant documents which may have been relied upon in support of the charges. It is further observed that if a document even*

though mentioned in the memo of charges, has no bearing on the charges or if it is not relied upon or it may not be necessary for cross-examination of any witness, non-supply of such a document will not cause any prejudice to the delinquent. The inquiry would not be vitiated in such circumstances. In State of T.N. v. Thiru K.V. Perumal relied upon by the appellant, it is held that it is for the delinquent to show the relevance of a document a copy of which he insists to be supplied to him. Prejudice caused by non-supply of document has also to be seen. In yet another case relied upon by the learned counsel for the appellant, reported in ***State of U.P. v. Harendra Arora*** (emphasis mine) *it has been held that a delinquent must show the prejudice caused to him by non-supply of a copy of the document where order of punishment is challenged on that ground."*

(emphasis supplied)"

21. This Court, therefore, is of the opinion that the petitioner is not in a position to raise such a plea today in these proceedings. In view of these findings, this Court is not inclined to interfere with the decision of the Disciplinary Authority or the Appellate Authority on grounds of non service of a copy of the enquiry report.

22. Having observed so, this Court would further observe that the allegation of non-submission of accounts or any financial loss occasioned thereby is nothing, but a vague

allegation. There are no details/materials specifying or quantifying the period, for which, the revenue collection/ accounts have not been submitted. Also, there is no detail based quantification of any specific amount of alleged revenue loss arising out of such lapse.

23. In absence of any details regarding accounts allegedly not submitted by the petitioner as also absence of any detail/assessment of quantum of loss occasioned by non-submission of accounts, the Court finds that the only substantial charge against the petitioner was of unauthorized absence from 28-09-2012 till issuance of the charge memo on 26-04-2013, slightly more than six months. This absence is also admitted by the petitioner, but justified by raising a plea of his illness. In the circumstances, this Court is of the opinion that the punishment of compulsory retirement awarded is disproportionate and excessive to the only substantial charge against the petitioner. The punishment of compulsory retirement, however, is founded also on holding of the charge of non-submission of accounts and loss occasioned thereby having been proved. As already observed these two charges are devoid of any substance since there is no assessed/quantified loss. There is no charge in detail regarding the period for which the accounts were not submitted

as also absence of any assessment/quantification of alleged loss. Finding on these charges are thus required to be excluded. Once that is done, the punishment of compulsory retirement, which is after taking into consideration these two irrelevant charges, devoid of substance, have to be held as being harsh and disproportionate to the one and only substantial charge proved in the enquiry, being petitioner's absence of little over six months. Such conclusion of this Court is taking into consideration decision of the Apex Court in the case of ***Chairman -cum- Managing Director, Coal India Limited & Anr. vs. Mukul Kumar Choudhuri & Ors.*** reported in ***(2009)15 SCC 620.*** The Apex Court, in the said case, was also dealing with punishment for proved misconduct of unauthorized absence for six months. Paragraph nos. 20 and 21 of the decision, relevant to the present case, reads as follows:

> *"**20.** One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.*
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> ***21**. In a case like the present one where the misconduct of the delinquent was unauthorised absence from duty for*

> *six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reasons for his absence by stating that he did not have any intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations."*

24. The order of compulsory retirement dated 11-12-2014 issued by the District Magistrate, Jehanabad (Respondent No.4), as contained in Annexure-6 to the writ petition is, therefore, quashed. The order of the appellate authority dated 10-06-2020 (Annexure-10) affirming the disproportionate order of punishment must also collapse and is hereby quashed.

25. The matter is remanded to the Appellate Authority (Respondent No.3) for reconsideration on the point of suitable punishment, less than compulsory retirement to be imposed on the petitioner. The Court is of the opinion that the Respondent No.3 should also pass order on entitlement of the petitioner for the period from the date of charge memo till passing of fresh order within eight (08) weeks from the date of receipt/production of a copy of this order.

26. The writ application is accordingly allowed.

(Madhuresh Prasad, J)

shyambihari/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	28.10.2023
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