

(2015) 04 JH CK 0029

In the Jharkhand High Court

Case No : Writ Petition (S) No. 1292 of 2009

Arun Kumar Choudhary

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 23-04-2015

Acts Referred:

Citation : (2015) 3 AJR 658 : (2015) 146 FLR 316 : (2015) 2 JLJR 661

Hon'ble Judges : Rongon Mukhopadhyay, J

Bench : Single Bench

Advocate : Manoj Tandan, for the Appellant; D.K. Dubey, Sr. S.C. I, Advocates for the Respondent

Final Decision : Allowed

Judgement

Rongon Mukhopadhyay, J.—In this writ application the petitioner has prayed for quashing of the notification as contained in Memo No. 758 dated 03.04.2007 issued by the respondent No. 3 whereby and whereunder the petitioner has been given a major punishment of stoppage of two increments with cumulative effect and the promotion of the petitioner has been stopped for 5 years. The petitioner has further challenged the order as contained in Memo No. 1281 dated 08.04.2009 by which the appeal preferred on behalf of the petitioner against the order of infliction of major punishment has been rejected by the Appellate Authority.

2. The facts which arise out of the averments made in the writ application are that, the petitioner was posted as an Executive Engineer in Irrigation Division, Baunsi, District Banka, Bihar for the period from 30.07.2002 to 28.10.2004. The proposal for construction of Escape Weir over the Hidambi Bandh in Rakauli River at Chain 0.0 recommended by the Chief Engineer, Water Resources Department, Bhagalpur, on the basis of a report submitted by the then Superintending Engineer vide letter No. 3763 dated 03.12.1997, was put forward. The Chief Engineer, Water Resources Department, Bhagalpur vide letter No. 3170 dated 02.11.1998 informed the Superintending Engineer, Patna that the scheme for the

construction has been inquired into and approved by the Chief Engineer, Patna and as such the additional amount of Rs. 70.54 lacs be allotted. No action was taken on the issue as proposed and in the year 2001, the estimate was revised by NABARD for the purposes of fund allotment and the rate was changed and the revised estimate of Rs. 63.04 lacs was prepared. On the basis of the direction given by the departmental officers, the Assistant Engineer, Irrigation Sub-Division, Punjbara and the Superintending Engineer, Irrigation Circle, Bhagalpur had prepared the revised estimate of Rs. 64.19 lacs and the same was submitted to the department in July 2003 and on inquiry made by the Chief Engineer, technical approval was granted for an amount of Rs. 64.19 lacs. Pursuant to the approval granted by the competent authority tenders were invited and on 14.01.2004 the work was allotted to Sriram Stone and Construction Limited, Baunsi and an agreement was also entered into and a work order was issued. However, pursuant to a meeting presided over by the Minister, Water Resources Department, the entire project for construction of Escape Weir over the Hidambi Bandh in Rakauli River was cancelled and directions were given to carry out necessary repair work in the said dam. The petitioner was served with a letter dated 08.09.2004 by the Deputy Secretary, Department of Water Resources, Bihar in which in terms of Rule 55A of the Civil Services (Classification, Control and Appeal) Rules, 1956, petitioner was directed to submit an explanation. Since the cadre bifurcation had taken place in the meantime and the services of the petitioner was allocated to the State of Jharkhand, the State of Jharkhand issued a circular as contained in Memo No. 3284 dated 13.08.2005 by which a proceeding was initiated under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and respondent No. 5 was appointed as an inquiry officer. The petitioner had submitted his explanation vide letter No. 16 dated 14.04.2006 and thereafter an inquiry was conducted and an inquiry report dated 13.05.2006 was also prepared in which none of the charges levelled against the petitioner was found to have been proved. However, in terms of Memo No. 758 dated 03.04.2007, the disciplinary authority disagreed with the findings of the inquiry officer and inflicted a major punishment upon the petitioner which resulted in stoppage of 2 increments with cumulative effect and stoppage of promotion of the petitioner for a period of 5 years. An appeal was preferred by the petitioner before the Appellate Authority on 28.06.2007 which was however rejected.

3. Heard Mr. Manoj Tandon, learned counsel for the petitioner and Mr. Dhananjay Kumar Dubey, learned Senior Standing Counsel I on behalf of the State of Jharkhand.

4. The learned counsel for the petitioner has submitted that the petitioner was posted as an Executive Engineer in Irrigation Division, Baunsi, District Banka in the State of Bihar from 30.07.2002 to 28.10.2004 and the proposal for construction over the Hidambi Bandh was initiated much prior to the posting of the petitioner in Baunsi and even thereafter since the project itself was cancelled at the instance of the departmental Minister, the department was never put to a

loss and in such circumstances, the departmental proceeding itself should not have been initiated. It has further been submitted that the order of the disciplinary authority as contained in Memo No. 758 dated 03.04.2007 is cryptic and non-speaking order and no reason has been assigned by the disciplinary authority with respect to his disagreement with the findings of the inquiry officer. It has also been submitted by the learned counsel for the petitioner that since the proposed punishment sought to be inflicted upon the petitioner was a major punishment by disagreeing with the findings given in the inquiry report, the petitioner should have been given a second show-cause notice to enable him to put forward his case, but the disciplinary authority had acted and passed the impugned order dated 03.04.2007 brushing aside the settled principles of law. The learned counsel for the petitioner has also referred to Rule 49 of the Civil Services (Classification, Control and Appeal) Rules by submitting that if at all the disciplinary authority was of the view that an order of punishment should be inflicted upon the petitioner after following the necessary procedure even then the petitioner could not have been fastened with withholding of increments as well as stoppage of promotion in view of the clear bar to such punishment as laid down in Rule 49(ii) of the Civil Services (Classification, Control and Appeal) Rules. Even the Appellate Authority did not consider the fact that the disciplinary authority had passed a non-speaking order while rejecting the appeal of the petitioner on 08.04.2009 and in fact as has been submitted by the learned counsel for the petitioner, the Appellate Authority instead of rectifying the mistake committed by the disciplinary authority himself has passed a non reasoned order which is also contrary to the settled principles of law.

5. Mr. D.K. Dubey, learned Sr.S.C. I on the other hand, while relying on the counter affidavit has submitted that the departmental proceeding had been conducted following the due process of law and the principles of natural justice has also been adhered to. It has been submitted that the petitioner was found guilty of producing a false estimate for its technical sanction and since the petitioner has a part to play in the irregularities which were found, the disciplinary authority has rightly inflicted the punishment of withholding the increments and stoppage of promotion for 5 years. It has also been submitted that the Appellate Authority while affirming the order of the disciplinary authority had recorded the submissions of the petitioner and thereafter had rejected the appeal of the petitioner and thus, it cannot be said that the Appellate Authority had not applied its mind to the facts enumerated before it.

6. The charges which were framed against the petitioner are as follows:

A Before Execution of the Hidambi Irrigation Project, the ground level in terms of the map was not compared with the actual ground level.

B Without conducting of L Section and Cross Section of the Hidambi Channel, wrong estimate was approved pursuant to which the allotment of work was done which caused a loss to the Government of Rs. 64.20 lacs.

C Refusal to put signature by the Executive Engineer and the Assistant Engineer in the level taken by the Flying Squad.

7. The inquiry which was conducted on the charges mentioned above did not find it proved and accordingly the inquiry report was submitted. The order of the disciplinary authority as contained in Memo No. 758 dated 03.04.2007 has mentioned about the charges framed against the petitioner and has straightway passed an order of punishment by stopping two increments with cumulative effect and stoppage of promotion for a period of 5 years from the date the promotion is due. The disciplinary authority although differed with the findings of the inquiry officer, but there is no reflection in the order dated 03.04.2007 as to under what circumstances the disciplinary authority had differed with the finding of the inquiry officer. There is not even a whisper in the entire order dated 03.04.2007 from which it can be deduced the reasons for differing with the findings of the inquiry officer. This reflects total non-application of mind on the part of the disciplinary authority which is de hors the settled principles of law. Moreover, if the disciplinary authority sought to have disagreed with the inquiry report and a major punishment was proposed to be inflicted upon the petitioner, a notice ought to have been served upon the petitioner to seek an explanation or a show-cause against the proposed punishment, but the disciplinary authority on the contrary inflicted an order of major punishment upon the petitioner in which neither any reason has been assigned nor has any prior show-cause notice been issued upon the petitioner.

8. In the case of Punjab National Bank and Others Vs. Sh. Kunj Behari Misra, (1998) 6 AD 220 : AIR 1998 SC 2713 : (1998) 2 CTC 742 : (1998) 5 JT 548 : (1998) LabIC 3012 : (1998) 2 LLJ 809 : (1998) 4 SCALE 608 : (1998) 7 SCC 84 : (1998) SCC(L&S) 1783 : (1998) 1 SCR 22 Supp : (1999) 1 SLJ 271 : (1998) AIRSCW 2762 : (1998) 6 Supreme 486 , it was held as follows:

19. "The result of the aforesaid discussion would be that the principles of natural justice have to be read into Regulation 7(2). As a result thereof, whenever the disciplinary authority disagrees with the enquiry authority on any article of charge, then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings. The report of the enquiry officer containing its findings will have to be conveyed and the delinquent officer will have an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the enquiry officer. The principles of natural justice, as we have already observed, require the authority which has to take a final decision and can impose a penalty, to give an opportunity to the officer charged of misconduct to file a representation before the disciplinary authority records its findings on the charges framed against the officer."

9. Relying on the judgment in the case of "Punjab National Bank and others" (supra), this Hon"ble Court in the case of "Arun Kumar Vs. State of Jharkhand and others" reported in 2007 (1) JLJR 433 had also held that the

disciplinary authority is not bound to accept the inquiry report and has a right to disagree with it and formulate its own opinion. However, the disciplinary authority is bound to issue a second show-cause notice to the delinquent employee indicating the grounds for such disagreement and seek his response. It has also been held that the disciplinary authority is required to record grounds of disagreement while formulating its opinion.

10. The Appellate Authority did no better. In the order of the Appellate Authority as contained in Memo No. 1281 dated 08.04.2009, discussions have been made about the points raised by the petitioner and has thereafter substituted its own findings while coming to the conclusion that there is no error in the order of punishment passed by the disciplinary authority. The Appellate Authority has not taken into consideration the fact that no reasons have been assigned by the disciplinary authority while differing with the findings of the inquiry officer; and that the inquiry report clearly highlights that the charges against the petitioner have not been proved. The order of the Appellate Authority seems to have proceeded on a pre-conceived notion to affirm the order of punishment of the disciplinary authority as would be apparent from the order of the Appellate Authority, since no discussion has been made on either the findings of the inquiry report or the final order of punishment inflicted by the disciplinary authority.

11. In the case of *Chairman, LIC of India and Others Vs. A. Masilamani*, (2013) 136 FLR 81 : (2013) LLR 301 : (2012) 11 SCALE 413 : (2013) 6 SCC 530 : (2013) 2 SCT 283 , while considering as to what extent there should be application of mind on the part of the Appellate Authority, it is held as follows:

19 "The word "consider" is of great significance. The dictionary meaning of the same is, "to think over", "to regard as", or "deem to be". Hence, there is a clear connotation to the effect that there must be active application of mind. In other words, the term "consider" postulates consideration of all relevant aspects of a matter. Thus, formation of opinion by the statutory authority should reflect intense application of mind with reference to the material available on record. The order of the authority itself should reveal such application of mind. The appellate authority cannot simply adopt the language employed by the disciplinary authority and proceed to affirm its order."

12. With respect to the punishment which has been inflicted upon the petitioner, the learned counsel for the petitioner has drawn the attention of the Court to a note-sheet dated 10.04.2008 wherein it was clearly indicated that the Project itself could not be started and no expenses were incurred in the Project and therefore recommendations were made that the major punishment inflicted upon the petitioner should be diluted; and that he should be given a warning for the period 2003-04. This recommendation has never been considered by the Appellate Authority while rejecting the appeal of the petitioner.

13. The petitioner is guided by the Civil Services (Classification, Control and Appeal) Rules and Rule 49 envisages the penalties which may be for good and

sufficient reasons be imposed upon the members of the services and for the purpose of deciding the present writ application and as has been pointed out by the learned counsel for the petitioner, Sub-Rule (ii) being relevant is quoted hereinunder:

49(ii) "Withholding of increment or promotion including stoppage at an efficiency bar."

14. The penalty as mentioned in Sub-Rule (ii) to Rule 49 is not in addition to each other, but is in the alternative to the effect that either a penalty of withholding of increments can be inflicted or withholding of promotion including stoppage at an efficiency bar can be imposed.

15. The petitioner has been inflicted with a punishment of stoppage of increments for 2 years with cumulative effect as well as stoppage of promotion for 5 years from the date of due of such promotion which is against the spirit and contents of Sub-Rule (ii) to Rule 49 of the Civil Services (Classification, Control and Appeal) Rules.

16. In this context, reference may be made to the case of "Sri Nageshwar Prasad Sinha Vs. The State of Bihar and Others" reported in (2003) 2 PLJR 813, wherein on being questioned with respect to inflicting both the punishments affecting increments and promotion, the State had withdrawn the punishment of increments and as such no final decision could be taken.

17. The net result of the discussions made above would ultimately lead this Court to conclude that the order/notification as contained in Memo No. 758 dated 03.04.2007 issued by the respondent No. 3 being the disciplinary authority is a cryptic and non-speaking order which reflects total non application of mind on the part of the disciplinary authority and hence the same deserves to be quashed and set aside. Similarly, the Appellate Order as contained in Memo No. 1281 dated 08.04.2009 rejecting the appeal preferred by the petitioner is not in accordance with law since the basic foundational error/irregularity performed by the disciplinary authority has not been taken into consideration and accordingly the same also deserves to be quashed and set aside.

18. In the result, this application is allowed and the matter is remitted back to the respondent No. 3 to take a fresh decision in accordance with law within a period of 6 weeks from the date of receipt/production of a copy of this order.