

(2008) 03 PAT CK 0031
In the Patna High Court
Case No : CWJC No. 128 of 1999

Mohd. Hussain Ansari

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:

Citation : (2008) 4 PLJR 701

Hon'ble Judges : Navin Sinha, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Navin Sinha, J.—Heard Learned Counsel for the petitioner and Learned Counsel for the State. The petitioner was proceeded against departmentally. After submission of the enquiry report dated 21.1.1995 he was issued a second show cause notice leading to the order of dismissal from service on 20.6.1998.

2. The works in question related to excavation of earth for construction of a diversion channel in the Durgawati Reservoir Project and removal of the earth retrieved during excavation and use of stones of specified quality in the rip rap work.

3. Learned Counsel for petitioner submitted that the petitioner joined on the post of Assistant Engineer in the project for the specified works on 1.10.1986. Prior thereto the tender for the works had been finalized, rates fixed inter alia for removal of earth excavated by head load process. The contractor had already represented for modification of the contract for removal of excavated earth by mechanical process due to the hard nature of the soil and had in fact removed them by mechanical process awaiting modification of the contract. Two bills were, therefore, submitted originally on basis of removal of earth on head load basis under the terms of the existing contract. Both these bills had been submitted before the petitioner joined. The nature of the soil was enquired into, recommendation made by the Executive Engineer which was approved by the

Chief Engineer whereafter a fresh contract was signed between the contractor and the Government approving removal of earth by mechanical basis. Thereafter, a third bill was prepared, being the differential amount of the payment due to the contractor for the higher costs incurred for the removal on mechanical basis as distinct from the head load basis provided for under the original contract. After the modification of the contract all payments were released at the enhanced rate. It is his contention that this modification was done with retrospective effect. The enquiry report accepts the aforesaid position of the petitioner not being present when the works as aforesaid were done. It also accepts the modification of the original contract. Yet it holds him guilty on conjectures and surmises by arriving at the finding that when the earth had in fact been removed on a head load basis prior to the modification of the contract, payment for the same on mechanical basis smacks of a conspiracy. This, Learned Counsel submits, was perverse in view of the retrospective modification of the terms of the contract including payment. It is next submitted that in so far as the use of substandard quality of stones is concerned, the rip rap work where such stones were to be used had not commenced during his tenure. It is lastly submitted that even though the enquiry report holds the superior officers more responsible than the petitioner including the Chief Engineer and the Superintending Engineer, no action has been taken against the Chief Engineer. This assertion in paragraph-54 of the writ application has not been denied and the answer has been evaded purposefully in paragraph-30 of the counter affidavit. Reliance was placed on a Division Bench order of this Court in L.P.A. No. 181/97 in the case of Pandey Uma Shankar Prasad vs. State of Bihar & Ors. and analogous cases in support of the submission made.

4. Counsel for the State urged that there has been no procedural irregularity in the departmental proceeding. The petitioner was not denied adequate opportunity for his defence and only after issuance of a second show cause notice the impugned order has been passed.

5. Earlier a departmental proceeding was initiated against the petitioner in the year 1991 inclusive of the present two charges. The petitioner was sought to be punished therein alongwith certain others. It was questioned in writ applications before this Court when a Bench of this Court by its judgment and order dated 17.11.1992 noticed that there had been grave procedural irregularities in the conduct of the proceedings. The members of the flying squad when summoned for evidence did not turn up, of those who did, they only stated that they did not hold any enquiry or verification and they signed the enquiry report at the behest of the Superintending Engineer. The copy of the report of the flying squad had not been furnished to the delinquents. The order of punishment of dismissal was, therefore, set aside with liberty to proceed afresh in accordance with law. What was observed by the Division Bench then carries its relevance for the present proceedings also as despite the observations of the Court the respondents did not even attempt to become any wiser, but, as it appears, treating the words of the Court as pious observations with disdain.

6. The Bench held at para-4 as follows:-

We have come across a large number of cases coming from the Water Resources Department in which merely on the basis of the report of the Flying Squad persons have been held guilty and punished, without even giving copy of the report to the delinquent, as in the present cases. We wonder how such a report, which is prepared on the basis of the enquiry behind the back of the persons and by persons who come from the same stock of engineers should be considered so sacrosanct. We have expressed surprise and dismay in various orders as to why the authorities concerned should allow the proceeding to be conducted in such a casual manner. The officers of the Department are expected to know the basic and fundamental principles in the matter of conduct of disciplinary proceeding. They are contained in the rules and the circulars of the State Government, the nature and scope of such proceedings has been stated and restated in countless number of cases by courts. If they do not know that we wonder whether they should be allowed to hold any responsible position in the State Secretariat. We have an uneasy feeling as to whether the officers are not passing order in such a manner deliberately or leaving lacunae in the proceeding only to indirectly help the persons knowing fully well that the orders passed in violation of rules of natural justice are in all likelihood to be interfered with in judicial proceeding. This has resulted in unavoidable litigation and burden upon courts. We have been sending copies of such order to the various authorities of the State but, it appears with no result. We do not want to say more to express any anguish.

7. Thereafter fresh charges were framed against concerned delinquents including the petitioner in 1993, as noticed above.

8. Learned Counsel for the petitioner, from the discussions contained in the enquiry report itself, is correct in the submission that the subject matter of the first two bills and the physical removal of the earth had taken place prior to the petitioner joining the project works. The petitioner had only prepared the third bill of the differential amount of the first two bills between that provided for in the contract for removal of the earth on head load basis and that payable for removal of earth by mechanical means after the contract had been modified retrospectively. Once the enquiry officer has accepted that the original contract was modified for removal of earth on mechanical basis, the very substratum of the allegations against the petitioner of having initiated the third bill which paid the differential amount consequent to the modification of the contract vanishes. At this stage it is very relevant to take note of the findings in this regard of the Division Bench in L.P.A. No. 181/97 and analogous cases relied upon by the petitioner. The Division Bench at paragraph-6 had noticed:-"It appears that subsequent thereto this agreement was substituted and it was agreed that instead of the head load basis, the payment would be made on mechanical load basis. There is no dispute that this substitution was effected with retrospective effect. There is also no dispute that subsequent to this substitution payment of the difference of the price for the work done was paid to the contractor. The

original contract was made by the Government. The substitution thereto was also made by the Government. The petitioners were employees of the Government. If the Government had agreed to pay to the contractor on mechanical load basis, despite the work having been done on the head load basis, the petitioners, the employees of the Government, could not refuse to make such payment and if they have done so, the same would amount to insubordination. Therefore, no prudent person on the basis of the materials on record could come to the conclusion that by facilitating payment on mechanical basis in spite of the work having been done on head load basis, the petitioners acted in a manner for which they are to be disciplined".

9. In a departmental proceeding, strict rules of evidence shall not apply. The findings can be based on what is called a preponderance of probability. The test therefore shall be if a reasonable and prudent person could have arrived at the same decision based on the materials available. If the "conclusion was one on which no reasonable prudent person would arrive on the basis of the materials available, or if there was no material available to arrive at such conclusion, or in the event that the findings were perverse, as distinct from cases of insufficiency of evidence, the court shall interfere. this Court therefore finds no reason to arrive at any different conclusion than that arrived at by the Division Bench.

10. In so far as the second charge is concerned, this Court can do no better than quote from the Division Bench judgement of L.P.A. No. 181/97:-"The flying squad reported that on eye estimation it is of the view that inferior quality of slope stone/boulders were used, when they also recorded and as the records show that inspection department cleared the materials before the same were used". this Court wonders what was the method and technology of "eye estimation" of the quality of the stones used, which otherwise would necessarily have to be the subject matter of a geological report.

11. The allegations are of conspiracy. The petitioner has admittedly been found not to be present when the works in question were done and the payments for which have Involved him in the controversy. Those who were involved in the higher echelons have been allowed to go scot free. The respondents have not explained for the same. Perhaps, this is one fact which speaks volumes about the fairness and impartiality of the respondents.

12. In the result, the impugned order of dismissal dated 20.6.1998 and the enquiry report dated 21.1.1995 are accordingly quashed.

13. The petitioner is stated to have superannuated in January, 1999. He shall therefore be deemed to have continued in service and superannuated on the due date. He shall therefore be entitled to full wages for the period of suspension till his date of superannuation inclusive of all increments, allowances etc. His pensionary benefits shall be refixed and recalculated. Let all such financial benefits be made available to the petitioner within a maximum period of four months from the date of receipt/production of a copy of this order before

respondent No. 2. The writ application stands allowed.