(2005) 09 PAT CK 0020

In the Patna High Court

Case No : CWJC No. 1397 of 2000

Ram Dihal Choudhary APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 30-09-2005

Acts Referred:

Bihar Pension Rules, 1950 — Rule 43B
Civil Services (Classification, Control and Appeal) Rules — Rule 55

Citation : (2005) 4 PLJR 374

Hon'ble Judges : Barin Ghosh, J

Bench : Single Bench

Advocate : Satish Chandra Jha No. 3, for the Appellant; S.S. Mishra, for the Respondent

Final Decision : Allowed

Judgement

Barin Ghosh, J.—Agreement No. 4F2 of 89-90 was executed between the Contractor and the State represented by the Executive Engineer, Canal Division, Madhubani for execution of earthwork in canal and turfing from RD 62.05 to RD 67.20. The work order in relation thereto was issued on 23rd February, 1990. The value of the said contract was for Rs. 13.18 lacs in respect of 48,85,900 cubic feet. In terms of the said work order, the work commenced when the Natural Surface Level (in short ''NSL'') was recorded in Measurement Book No. 483 by the Junior Engineer and the same was verified by the Assistant Engineer as well as the Executive Engineer. Subsequent thereto the petitioner was posted as Executive Engineer of the said Division and he worked as such during the period between 27th August, 1990 and 22nd January, 1991.

2. On 12th November, 1993 the petitioner was asked to show cause in respect of the following charges:-

"(1) Charge.-(i) During the aforesaid period of posting, the prima facie charge to incur financial loss to the Government by making excess payment without site checking of earthwork which is established by the facts noted below:-

(A) In the construction of Sakari Branch Canal from R.D. 67.00 to 62.05 in place of 4.30 lakh Cft. of earthwork 17.50 lakh Cft. of earthwork was done and paid on the basis of Measurement Book.

(B) In the excavation of foundation of the structure under construction at R.D. 57.99 of Sakari Branch Canal the actual earthwork involved was found 1885 Cubic meter but by recording the quantity of earthwork as 4110 cubic meter in the Measurement Book No. 498, your role has been found proved in laying the basis of excess payment because lack of check and control at your level is established."

3. On 30th November, 1993 the petitioner gave an interim reply to the show cause notice and requested for furnishing of certain documents in order to enable him to give a detailed reply. The petitioner was not thereupon informed anything about the said show cause or the reply thereto. No document as was sought for by the petitioner was furnished to him.

4. On 8th November, 1996 an Enquiry Officer was appointed. By letter dated 20th November, 1996 the petitioner was asked to appear before the Enquiry Officer on 12th December, 1996. It is the contention of the petitioner that this letter was not received by him. The petitioner accordingly did not appear before the Enquiry Officer. Once again, the petitioner was asked by a letter to appear before the Enquiry Officer. Again the petitioner did not appear and it is the case of the petitioner that the letter did not reach him. Thereupon a peremptory date was fixed for appearance of the petitioner but again the petitioner did not appear and it is the contention of the petitioner that the letter did not reach him. This peremptory date was fixed on 9th January, 1997. The petitioner retired on 31st January, 1997. On 1st February, 1997 the Enquiry Officer was informed that the petitioner is posted in a project since 11th November, 1996. An attempt was made to serve the notice of enquiry upon the petitioner through the Project Coordinator but inasmuch the petitioner retired in the meantime, no notice of enquiry reached the petitioner. When it transpired to the Enquiry Officer that the petitioner has retired, an attempt was made to ascertain the home address of the petitioner but the same was not available on records. Ultimately a newspaper advertisement was published on 14th July, 1997 fixing 25th July, 1997 as the date of hearing. The petitioner did not turn up at the enquiry. As a result, on 26th August, 1997 the Enquiry Officer decided to proceed ex parte against the petitioner. The Enquiry Officer, as it appears from the enquiry report, did not record any evidence and concluded as follows:-

"Since the charged officer has not given any explanation and has not appeared after all efforts, therefore, the findings related to charge is based merely on the statements of the first party i.e. the complainant.

Shri Ram Dihal Chaudhary took over charge from Shri Madan Mohan Thakur. Till the period of Shri Madan Mohan Thakur, payment of about 14 lakh Cft. of earthwork had been made. Shri Chaudhary made payment thereafter, and the total quantity of paid earthwork became about 17.50 lakh Cft. After the transfer of Shri Chaudhary, Shri Damodar Rai took over charge from him. He took the measurement of the work and found that the total quantity of earthwork was 4.30 lakh Cft. The Superintending Engineer, Western Kosi Canal Circle, Darbhanga also took the measurement of the work done. The measurement taken by the Executive Engineer and the Superintending Engineer were found more or less same. No reference has been made about the estimated quantity. However, the results of the enquiry of Superintending Engineer and Executive Engineer being the same makes the enquiry undoubtful. There is no reason to doubt over the result of this enquiry.

Therefore, the charges levelled against Shri Ram Dihal Chaudhary are proved."

5. A second show cause notice was thereupon issued on 20th October, 1998; contents thereof are as follows:-

"Drawing your attention on the subject noted above, I am directed to say that an explanation was asked vide Government letter No. 3432 dated 12.11.1993 under Rule 55 ''A'' of Civil Services (Classification, Control and Appeal) Rules for the irregularities done during the period of posting in Western Koshi Canal Division, Madhubani Camp Sakari. The detailed explanation was not submitted by you. The matter was thoroughly examined at Government level in the light of explanations received from other charged officers. After examination, it was decided to start departmental proceeding under Rule 55 of Civil Services (Classification, Control and Appeal) Rules. Accordingly, departmental proceeding was started vide departmental Resolution No. 2396 dated 8.11.1996. No cooperation was made at your level in conducting the departmental proceeding. The charge was found proved in the enquiry report received from the enquiry officer. You retired on 31.1.97 before taking the final decision regarding the departmental proceeding. As a result, it was decided to keep departmental proceeding effective under Rule 43B of Bihar Pension Rules and it was notified vide departmental order No. 915 dated 13.8.98.

Enquiry report of the departmental proceeding was thoroughly examined at Government level. After careful examination, you have been found guilty for the following reasons:-

(k) For making payment of 3.30 lakh Cft. of earthwork out of 17.50 lakh Cft. of earthwork done in place of 5.00 lakh Cft. of earthwork by showing the NSL low in the construction of Sakari Branch Canal from R.D. 62.5 to 67.20, though your posting had been done after Shri Madan Mohan Thakur.

(Kh) Non-participation in departmental proceeding.

Therefore, it was decided to give you punishment under Rule 43B of Bihar Pension Rules.

Enclosing the enquiry report of departmental proceeding, it is to say that submit your explanation within 15 days that "why your full pension be not withheld forever under Rule 43B of Bihar Pension Rules."

"Kindly submit your explanation to the Government during the stipulated period otherwise it will be presumed that you have nothing to say in this matter."

6. The petitioner gave a reply to the second show cause notice on 20th November, 1998, principally contending that the charge, as was originally framed and enquired, is different than the charge mentioned in the show cause. Subsequent thereto the impugned order dated 29th October, 1999 was passed which is as follows:-

"Shri Ram Dihal Chaudhary, the then Executive Engineer, Western Koshi Canal Division, Madhubani Camp Sakari was asked explanation vide departmental letter No. 3432 dated 12.11.1993 for the irregularities done by him during his period of posting under Rule 55A of Civil Services (Classification, Control and Appeal) Rules. Shri Chaudhary did not submit required explanation. The Government examined the case in the light of explanations submitted by other charged officers. After examination it was decided to start departmental proceeding under Rule 55A of Civil Services (Classification, Control and Appeal) Rules for severe irregularities committed by him. Accordingly, departmental proceeding was started vide Departmental Resolution No. 2396 dated 8.11.96. He did not cooperate in conducting departmental proceeding. The charge was found proved in the enquiry report of conducting officer. The matter was under the consideration of the department for final decision but in the meantime Shri Chaudhary, the then Executive Engineer retired from service on 31.1.97. As a result, it was decided to continue the departmental proceeding under Rule 43 of Bihar Pension Rules which was notified vide departmental order No. 915 dated 13.8.98.

The enquiry report of departmental proceeding was examined in detail at Government level. After detailed examination, Shri Chaudhary, the then Executive Engineer was found guilty for the reasons given below:-

(A) Extra payment of 3.30 lakh Cft. of E.W. instead of 5.00 lakh Cft. of E.W. i.e. excess payment of Rs. 1.33 lakh in the work of construction of Sakari Branch Canal from R.D. 62.05 to 67.20. The posting of Shri Chaudhary was after Shri Madam Mohan Thakur, Ex. Engineer and excess payment had already been made during the working period of Shri Thakur.

(B) Non-participation in departmental proceeding.

During the course of taking the decision by the Government for severe punishment (such as non-payment of full pension for ever), second show cause notice was served vide departmental letter No. 2985 dated 20.10.98. The reply to the second show cause was submitted by Shri Chaudhary, the then Ex. Engineer, vide his letter No. 5 dated 20.11.98. The matter was re-examined in detail by the Government in the light of reply obtained from Shri Chaudhary and after careful examination, Shri Chaudhary, the then Ex. Engineer was found guilty for the reasons given below:-

(1) For extra payment of 3.30 Cft. of E.W. instead of 5.00 lakh Cft. of E.W. i.e. excess payment of Rs. 1.33 lakh in construction of Sakari Branch Canal from R.D. 62.05 to R.D. 67.20.

(2) Non-participation in departmental proceeding.

Therefore, in the light of the decision taken by the Government after detaied examination of the matter, the following punishments under Rule 43B of Bihar Pension Rules are communicated to Shri Ram Dihal Chaudhary, the then Ex. Engineer of Western Koshi Canal Division, Madhubani Camp Sakari:-

(1) Recovery of Rs. 66,000/- (Sixty-six thousand).

(2) Stoppage of 50% pension for seven years."

7. When the chargesheet was issued it was contended that in the construction of the canal from RD 67.00 to RD 62.05, which may be put differently as RD 62.05 to RD 67.00, in place of 4.30 lakh cubic feet of earthwork, 17.50 lakh cubic feet of earthwork was done and paid on the basis of Measurement Book and at RD 57.99 the actual earthwork, as was done was found to be 1885 cubic meter but by recording the quantity of earthwork as 4110 cubic meter in the Measurement Book, excess payment was made. Admittedly in terms of the work order 48,85,900 cubic feet of earthwork was required to be done from RD 62.05 to RD 67.20. In such a situation it does not make any sense as to how in place of 4.30 lakh cubic feet of earthwork 17.50 lakh cubic feet of earthwork having been done excess payment could be made. It is quite appreciable that while actually 1885 cubic meter of earthwork was done but it was recorded that 4110 cubic meter was done in the Measurement Book, and excess payment was made. However, the Enquiry Officer did not make any whisper in relation thereto in his report. He reported that till the period of the predecessor of the petitioner, payment for about 14 lakh cubic feet of earthwork had been made and the petitioner made payment thereafter. The total quantity of paid earthwork came to be about 17.50 lakhs cubic feet. Whether this was inclusive of the payment made by the predecessor of the petitioner has not been indicated in the report in clear terms. However, a reading of the report would indicate that the total quantity of earthwork for which payment had been made by the petitioner and his predecessor was 17.50 lakhs cubic feet. It is stated in the report that the successor of the petitioner found the total quantity of earthwork done as 4.30 lakhs cubic feet, and this finding has been more or less confirmed by the Superintending Engineer. During the tenure of the petitioner, therefore, payment for 3.50 lakhs cubic feet of earthwork was made. Admittedly 4.30 lakhs cubic feet of earthwork was done. The charge that while 4.30 lakhs cubic feet of earthwork was done payment for 17.50 lakhs cubic feet of earthwork was accepted, assuming that was the principal charge. The moment it was found that payment for 14 lakhs cubic feet of earthwork had been made by the predecessor of the petitioner, the charge that the petitioner paid for 17.50 cubic feet of

earthwork in place of 4.30 lakhs cubic feet of earthwork could not be accepted. It could only be said that while less than 1.00 lakh cubic feet of earthwork had been done by the predecessor of the petitioner, the petitioner despite finding that his predecessor has paid for 14 lakhs cubic feet of earthwork did not make a report to that effect to the appropriate authority inasmuch as there is no dispute that during the tenure of the petitioner work worth 3.50 lakhs cubic feet was done. In relation to actual work done in RD 57.99 to the extent of 1885 cubic meter but payment made in relation to 4110 cubic meter, there is no finding in the enquiry report and as such proceeding on the basis that whatever has been stated by the Enquiry Officer in the report to be true, the one and the only conclusion would have been that the charges against the petitioner have not been proved.

8. In the second show cause notice it had been stated that after careful examination of the enquiry report it transpired that the petitioner made payment for 3.30 lakhs cubic feet of earthwork out of 17.50 lakhs cubic feet of earthwork in place of 5 lakhs cubic feet of earthwork. If that be so, then the petitioner has caused no loss to the Government. On the other hand, if earthwork shown to have been done is 17.50 lakhs cubic feet in place of 5 lakhs square feet actually done then also for making payment for 3.30 lakhs cubic feet of earthwork, the petitioner has not caused any financial loss to the State. In the second show cause notice, for the first time, it was alleged that the petitioner has shown the Natural Surface Level low and that too for the entire area of operation i.e. from RD 62.05 to RD 67.00. There is no dispute that before the petitioner was entrusted with the work, the work had already started. The petitioner could not, therefore, control the Natural Surface Level.

9. Be that as it may, while the work involved was from RD 62.05 to RD 67.00 the area of work was increased in the second show cause notice by mentioning that the work involved was from RD 62.50 to RD 67.20. This probably is not permissible. In addition thereto in the second show cause notice it was stated that non-cooperation in the departmental proceeding itself is an offence.

10. From the admitted position, as above, except the paper advertisement published after the retirement of the petitioner, there was no fruitful attempt to communicate to the petitioner that the disciplinary proceeding has commenced and the petitioner is required to be present at such proceeding. It is true that an advertisement was published fixing the date of hearing of the enquiry proceeding but by then the petitioner had retired. The petitioner retired from a pensionable service. The Enquiry Officer has reported in his enquiry report that the home address of the petitioner was not available on records, is that believable? I don''t think so. However, at the best, it may be said that despite the advertisement the petitioner did not appear at the hearing fixed on 25th July, 1997. It is not necessary for the people to read newspapers every day and that too advertisements. There is no presumption that the advertisement as was published on 14th July, 1997, should be deemed to have been read by the

petitioner. At the best, the advertisement shows that an effort was made to inform the petitioner that on 25th July, 1997 the Enquiry Officer will hear the matter. The petitioner did not turn up at the enquiry on 25th July, 1997. Thereafter on 26th August, 1997, the Enquiry Officer decided to proceed ex parte against the petitioner. He did not decide to do so on 25th July, 1997 when the date of hearing was fixed. He did not bother to give a notice that 26th August, 1997 is another date of hearing and if the petitioner does not appear, he would proceed ex parte. In such view of the matter, there was nothing on record to show that there was deliberate non-participation in the departmental proceeding by the petitioner. Mere non-appearance in the departmental proceeding cannot be a charge.

11. These aspects of the matter were highlighted by the petitioner in his show cause filed against the second show cause notice. These were not at all taken note of while passing the final order. Whereas in the chargesheet there was no mention as to what amount of money the petitioner has caused the State to loss, so there was no finding by the Enquiry Officer, and at the same time in the second show cause notice too, there was no mention in relation thereto, but in the final order the same was quantified at Rs. 1.33 lakhs but then for making payment for 3.30 lakhs cubic feet of earthwork. How extra payment can be made for 3.30 lakhs cubic feet of earthwork instead of 5.00 lakhs cubic feet of earthwork, no prudent person would be able to gather. Significantly in the final order it has not been mentioned that payment for 17.50 lakhs cubic feet of earthwork was made but actually earthwork for 5.00 lakhs cubic feet was done.

12. From the discussions as made above, it appears to be the contention of the State that while 17.50 lakhs cubic feet of earthwork was paid for actually work of 5 lakhs cubic feet was done. This was done by manipulating Natural Surface Level. The Natural Surface Level is taken at the time when the work commences. Admittedly work commenced before the petitioner took charge. Before the petitioner took charge, payment for 14 lakhs cubic feet of earthwork had been made. The petitioner, therefore, paid for 3.50 lakhs cubic feet of earthwork. Admittedly 5 lakhs cubic feet of earthwork was done. The petitioner did not do any work but paid for the alleged work, was not the charge. The petitioner manipulated the Natural Surface Level was also not the charge. The petitioner paid for 3.50 lakhs cubic feet of earthwork and actually 5 lakhs cubic feet of earthwork was done is an admitted position. In such circumstances, how the petitioner caused loss to the State has not been attempted to be explained either in the original chargesheet or in the enquiry report or in the second show cause notice or in the final order. As was alleged in the second show cause notice that the petitioner manipulated the Natural Surface Level is the core issue to show extra work done while, in fact, doing less work. This was not the subject matter of charge. The petitioner had no occasion to deal with the same. The Enquiry Officer did not go into that aspect of the matter. In answer to the second show cause notice, the petitioner pointed out that the Natural Surface Level was recorded by his predecessor and was not recorded by him, this has not been

dealt with at all in the final order.

13. In those circumstances, I have no other option but to quash the order of punishment, the second show cause notice, the enquiry report as well as the chargesheet. This will not, however, prevent the State to initiate appropriate proceedings against the petitioner in the event the petitioner has caused loss to the State by any of his conducts but the State shall initiate and conclude such proceedings strictly in accordance with law. The writ petition is thus allowed without any order as to costs.