

(2008) 01 PAT CK 0039
In the Patna High Court
Case No : LPA No. 941 of 2001

The State of Bihar and Others

APPELLANT

Vs

Sri S.K. Verma

RESPONDENT

Date of Decision : 15-01-2008

Acts Referred:

Citation : (2008) 01 PAT CK 0039

Judgement

Barin Ghosh and J.N. Singh, JJ.—On 22nd March, 1990, the writ petitioner-respondent was suspended. He, therefore, filed the first writ petition challenging his order of suspension. During the pendency of the first writ petition, on 22nd April, 1990 a charge sheet was issued against the writ petitioner-respondent and thereby a disciplinary proceeding was initiated against him under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules, 1950. In the charge sheet it was indicated that Sri B.N. Upadhyaya, the Superintending Engineer has been appointed as the Enquiry Officer and Sri Kalakand Kumar, Executive Engineer has been appointed as the Presenting Officer. The writ petitioner-respondent was asked to give his explanation with respect to the charges before the Enquiry Officer. The charge sheet contained nine charges but did not furnish any list of witnesses or documents.

The charges, as were levelled against the writ petitioner - respondent, were in relation to work connected with Durgawati Dam Project with which the writ petitioner-respondent was at the relevant time associated as the Executive Engineer.

2. By letters dated 5th May, 1990 and 18th June, 1990, the writ petitioner-respondent requested for documents and materials upon which the charges were intended to be proved. Those were not supplied. On 11th November, 1990, the writ petitioner-respondent gave his explanation to the Enquiry Officer and thereby denied the charges. On 30th July, 1990, the first writ petition was disposed of with a direction, inter alia, to conclude the disciplinary proceeding preferably within four months from the date of production of the order disposing

of the said writ petition.

3. The Enquiry Officer held enquiry proceedings on 10th October, 1990 and on 6th November, 1990. During the course of these proceedings, two reports of Flying Squad prepared respectively in November, 1987 and April, 1988 were produced before the Enquiry Officer and copies thereof were handed over to the writ petitioner-respondent. The next date of enquiry proceeding was scheduled to be held on 27th November, 1990 which was adjourned till 30th November, 1990. On this date too, no other material was brought on record of the enquiry proceeding and, if brought on record of the enquiry proceeding, copies thereof were admittedly not handed over to the writ petitioner-respondent. These two reports of the Flying Squad contradicted each other. The first report was prepared by three members. The second report was prepared by four members; of which three were those, who had prepared the earlier report. One Sri H.S. Singh, the then Superintending Engineer was the highest ranking Officer, who had been associated in preparation of these reports.

4. Though the last date of the proceeding of the enquiry was 30th November, 1990 but the disciplinary proceeding was not concluded within four months from the date of production of the order of the Court passed in the first writ petition and, accordingly, once again the writ petitioner-respondent filed another writ petition challenging the suspension order. In the counter affidavit filed to the second writ petition it was disclosed that the enquiry report has been submitted and charges levelled against the writ petitioner-respondent have been proved. The enquiry report, however, was not made over to the writ petitioner-respondent. On the writ petition, an order was passed on 21st May, 1991 and thereby the disciplinary authority was restrained from taking any further action against the writ petitioner-respondent. Subsequent thereto on 14th November, 1991, on the writ petition another order was passed and thereby a direction was given to the disciplinary authority to serve a copy of the enquiry report to the writ petitioner - respondent and the writ petitioner - respondent was given liberty to make a representation against the report. The Court directed that upon consideration of such representation, the final order should be passed and the same should be a speaking order. Only thereupon the enquiry report was served upon the writ petitioner-respondent through the learned Advocate engaged by him in the writ petition and thereupon he filed a representation. The representation was rejected by an order dated 8th January, 1992 and the disciplinary proceeding was concluded by passing an order of dismissal dated 17th June, 1992. Subsequent thereto the writ petition was amended and thereby a challenge was thrown to the enquiry report as well as to the order of dismissal. On 26th June, 1995, the writ petition was admitted and during the pendency of the writ petition on 31st January, 1997, the writ petitioner-respondent attained the age of superannuation.

By the judgment and order impugned in the present appeal, the writ petition was allowed when the enquiry report and the order dismissing the writ petitioner

from service were quashed. The principal reason was two fold, namely, the charge sheet as was issued was issued with closed mind for it was indicated therein that the writ petitioner is guilty of the charges as have been leveled against him and, secondly, no witness was called to prove the charges. In 2001 the present appeal was filed with a prayer for condonation of delay in preferring the appeal. In the meantime almost two years passed from the date of the order allowing the writ petition. By the judgment and order dated 16th June, 2001, the present appeal was allowed by a Division Bench without, however, condoning the delay. At the instance of the writ petitioner-respondent the matter then travelled to the Hon"ble Supreme Court. The Hon"ble Supreme Court by its judgment and order dated 15th December, 2005 set aside the judgment and order of the Division Bench allowing the appeal and remitted back the matter to this Court for consideration of the application for condonation of delay and also for consideration of the merits of the appeal. A Bench of this Court by its judgment and order dated 27th January, 2007 condoned the delay in preferring the appeal.

We, therefore, heard the parties on the merits.

The learned Counsel appearing in support of the appeal submitted that although in the charge sheet it was written that the writ petitioner-respondent is guilty of the charges as had been leveled in the charge sheet but the fact remains that the intention was to convey, as would be evidenced from the charge sheet itself that, prima facie, it appeared that the writ petitioner-respondent is guilty of the charges. We think the learned Counsel for the appellants is right in making such submission for the charge sheet itself depicts that the incidents leading to framing of the charges came to light from the last report of the Flying Squad and the manner in which the report had been prepared, indicated that there is very good reason to believe that the charges are genuine and, accordingly, although it was indicated in the charge sheet that the charges stand proved, but, for all practical purposes, it must be deemed that the communication was that the charges on the basis of the materials then collected, prima facie, seemed correct.

6. The learned Counsel appearing in support of the appeal next contended that it is true that no witness was examined before the Enquiry Officer but the fact remains that many documents and reports were produced before the Enquiry Officer and the same would also be evidenced from the enquiry report as the Enquiry Officer has annexed copies of such documents as part of the enquiry report. It was submitted that in disciplinary proceedings it is not necessary always to produce witnesses, as many matters may also be concluded on the basis of documentary records. We have no quarrel with the proposition as was propounded by the learned Counsel. However, the fact remains that the writ petitioner-respondent was not handed over copies of any of such documents, save and except two Flying Squads" reports, at the time of enquiry and, at the same time, from the order of the disciplinary authority it appears that the Enquiry Officer after conclusion of the enquiry made correspondence with Sri H.S. Singh. Therefore, a doubt cropped up as to when these documents, upon

which the Enquiry Officer relied, came to be placed before him. The Court, therefore, directed production of the proceedings of the enquiry. Those have not been produced and the explanation is that because the matter is old, the appellants have not been able to locate the same.

7. In a situation of this nature, the one and the only conclusion would be that in course of the enquiry, apart from the said two reports, no other document or paper was produced before the Enquiry officer. If that be so, the question is - could the Enquiry Officer rely upon any paper or document in his report apart from the said two reports? The answer would be a positive "No". If the Enquiry Officer is permitted to rely upon a document behind the back of the delinquent, the same would tantamount to grossest breach of the basic principles of natural justice.

8. In course of arguments before us, the learned Counsel for the appellants submitted that the charges have not been proved on the basis of the enquiry reports but they have been proved independently on the basis of independent documents. In view of such submission, the one and the only conclusion would be that there was nothing at all which could be looked at in law upon which a prudent person would conclude in the manner the same had been concluded by the Enquiry officer.

9. Be that as it may, we would try to find out whether in fact either on the basis of the enquiry reports or on the basis of the other documents relied by the Enquiry Officer, any person with average intellect can conclude the matter as had been concluded by the Enquiry Officer.

10. Before doing so, we must remind ourselves that a disciplinary proceeding can only be initiated when there is an allegation of misconduct against the delinquent. We are thus required to ascertain what misconduct is.

11. The Hon"ble Supreme court in the case of Union of India (UOI) and Others Vs. J. Ahmed, , has pronounced that an action would be misconduct when the same arose from ill-motive and also from acts of negligence, errors of judgment or innocent mistake, but only when the consequences thereof are catastrophic.

12. The first charge against the petitioner was as follows:

The block-sheet of primary level of over burden of Durgawati Spillway was got prepared by Executive Engineer, Mr. O.P. Narula and was given to you in original on issuing receipt. It was an important document on which there was the signature of Executive Engineer, all Assistant Engineers, Junior Engineers and the contractors of all groups. You kept this important document hidden due to which provisional payment of digging of over burden of spillway was made and possibility of false payment and manipulation arose. It is the proof of your ill-motive and connivance with contractors for false payment and for which you are held liable.

13. Therefore, the charge is that provisional payment of digging of over burden

of spillway was forced upon by the petitioner by concealing the block-sheet of primary level of over burden of Durgawati Spillway as was prepared. Neither the reports of the Flying Squads, nor the report of the Enquiry Officer show that payments for digging were to be made on the basis of block-sheet of primary level. On the other hand, in the enquiry report, in no uncertain terms it has been accepted that running payments had been made on the running account bills recorded in the Measurement Book. There is, therefore, no material on record at all to put home the charge. The Enquiry Officer felt that since the writ petitioner-respondent did receive the block-sheet of primary level, the charges stand proved. The conclusion is not only without any materials on record, but is based on mere surmises and conjectures.

14. The second charge against the writ petitioner-respondent was as follows:

The work of clay-blanketing was got done in the upstream of the darn between 5 and 11 Chains. There is diversion channel of Kharsota river very near the upstream of the dam, which passes across 5 to 11 Chain. The mouth of Durgawati river is also open. In this situation there was no justification of doing clay-blanketing in these six chains. The flow of the diversion channel was also through this part and slope of the channel is very sharp, so there is danger of clay-blanketing to be flown. This work should have been done at the time of river-closure 4-5 years earlier. This illegal work was got done under the conspiracy to make two payments to the contractor for the single work for which you are held liable.

15. The charge is taking of an unwise decision. The latter part of the charge that two payments made for the single work is part of other charges as would be discussed hereinafter. If that part of the charge is taken out, the charge is of error of judgment. In order to conclude an error of judgment as misconduct, it was necessary to indicate the consequence of such erroneous judgment. The charge sheet is totally silent on that score.

16. Be that as it may, while dealing this charge, one must look to the third charge also. While we shall deal with the third charge separately, it would be appropriate to indicate at this stage that in the third charge it was accepted that a tender was issued for awarding clay blanketing work between Chain 5 and Chain 11, and in pursuance with the said tender, a contract was awarded to a contractor. In the third charge it was stated that the said tender was invited by the writ petitioner-respondent and the said tender should not have been invited at the time when the same was invited for the work to be done in terms of the said tender should have been done when the river was closed. The Enquiry Officer found as a fact that the said tender though was invited by the writ petitioner-respondent but the same was invited with the approval of the Chief Engineer as vetted by the Superintending Engineer and, accordingly, he absolved the writ petitioner-respondent from the third charge. Therefore, it was unwise to do the work when the river was not closed, as was the second charge, was a decision accepted by the superior officers to the writ petitioner-respondent and,

accordingly, they must be said to be the persons responsible therefore and not the writ petitioner-respondent, who was subordinate to them.

17. Inasmuch as the writ petitioner-respondent was exonerated of the third charge, we need not discuss the third charge elaborately but it is our obligation to record here that the tender as was settled for the clay-blanketing between Chain 5 and Chain 11 was to be completed within a period of one month.

18. The fourth charge against the writ petitioner-respondent was as follows:

When the work of Kharsota Channel Division was got done in May-June, 1987, in the agreement payment for throwing the clay by head-load was illegally converted to mechanical load and the soil so to be thrown was accumulated between 5-11 Chain of the Dam towards the river. Showing again carriage of this accumulated soil by mechanical load for clay blanketing in five to eleven chain, two payments for a single work under two separate agreements were made to the contractor under a conspiracy in which about 40 lacs rupees were over paid. You have played a leading role in the conspiracy for making plan for this work and for implementation and payment thereof for which you are held completely liable.

19. In order to understand the true purport of Charge No. 4, one must also take note of Charges 5 and 7 which are as follows:

Charge No. 5: The soil of Kharsota Canal diversion has been earlier dumped on the place where the stripping work for clay blanketing work is shown. Therefore, for the imaginary measurement of stripping and illegal payment you are found completely guilty.

Charge No. 7: At the time of enquiry, you and your Assistant Engineers were told to show the disposal place of 7,69,494 cubic feet stripped earth, but you were unable to show the same. This measurement of stripping was a fake one for which you are completely guilty.

20. A reading of these charges would make it abundantly clear that it was being alleged that earth dug from Kharsota Canal were dumped between Chain 5 and 11 and such dumped earth was shown as the clay blanketing work. The charge was that before clay blanketing, stripping work was required to be done but without doing any stripping work it was shown that stripping work has been done. Neither the Flying Squads' reports establish by referring to any document or oral evidence of any person, nor the enquiry report prepared by the Enquiry Officer even whispers of any material or evidence of dumping of earth dug from Kharsota Canal in between Chain 5 and 11 where clay-blanketing work was to be done.

21. The Enquiry Officer has placed reliance upon a letter of the Assistant Engineer, who was then working under the writ petitioner-respondent and was also associated with the work in question. A look at the letter would reveal that the Assistant Engineer was complaining of dumping of earth by the contractor in

between Chain 0 (Zero) to 2.5. Apart from assertions made in the said letter of the Assistant Engineer, there is no other material at all which would suggest that earth dug from Kharsota Canal had been dumped in any Chain. At the same time, the clay blanketing work, as was awarded, was not for Chain 0 (Zero) to 2.5, but was for Chain 5 to 11. It is a fact that clay blanketing work was to be done after stripping work. It was alleged that soil of Kharsota Canal was dumped where stripping work was shown to have been done. As aforesaid, there is no material at all which would suggest that soil of Kharsota Canal was dumped at the place where stripping work was shown to have been done. It is true stripping work of 7,69,494 cubic feet had been shown to have been done in the Measurement Book. It is also true that clay blanketing work of 19,32,031 cubic feet was shown to have been done. These facts may not be disputed for the Measurement Book, as reported by the Enquiry Officer, depicts the same. The Enquiry Officer has found as a fact that the Presenting Officer himself had visited the site and found that earth has been dumped, but he is unable to say whether the same was dumped upon stripping or earth was otherwise dumped there. No effort had been made by the Flying Squad or by the Enquiry Officer to otherwise ascertain on engineering principles whether clay blanketing was done without doing the stripping work. The Enquiry Officer found that earth digging work of about 96 lacs cubic feet was completed by the self same contractor in about one and half years time in relation to Kharsota Canal, but the stripping work of about 7 lacs cubic feet and clay blanketing work of about 19 lacs cubic feet was done respectively in 4 and 12 days and, accordingly, concluded that without doing the work, the work was shown to have been done. At the same time, the Enquiry Officer in no uncertain terms held, while considering Charge No. 6, that the clay blanketing work was actually done. While doing so, he did not bring on record that in terms of the contract for clay blanketing work, stripping work was required to be done before clay blanketing, to be finished within only thirty days. The Enquiry Officer gave another justification for putting the charges home. He stated that in relation to digging work in Kharsota Canal, the contractor was paid a particular sum which was got increased later on but in the matter of stripping work, he agreed to the original price and not the enhanced price. In other words, he said that since the contractor charged "X" + "1" for digging of Kharsota Canal because he did the stripping work at "X" only, the stripping work had not been done. The above findings are based on surmises and conjectures.

22. The sixth charge against the writ petitioner-respondent was that in clay blanketing, actually the soil was spread without compression. The said charge was as follows:

As a matter of fact, the earth was spread over without its compaction in clay blanketing. There was already mud at that place and without removing it, the dumped earth was covered with debris and mud after spreading over the same. Thus wrong payment of Rs. 16,57,562/- was made apparently.

23. The allegation was that without removing mud which was present, dumping

work was done. The Flying Squad reports were prepared after the work had been completed. The reports do not suggest any material or any other evidence either documentary or oral which would suggest that mud was there and without removing the same earth was dumped. In the enquiry report there is no whisper about any material from which one can gather that in fact there was mud and such mud was required to be removed, but without removing such mud, earth was stripped. Even the scope of work mentioned in the contract does not suggest removal of mud before carrying out the clay blanketing work.

24. The eighth charge against the writ petitioner-respondent was as follows:

It is evident from letter No. 12 dated 17.3.1988 of the Superintending Engineer that you kept your Superintending Engineer and Chief Engineer in dark on 16.3.1988 about payment made for clay-blanketing work, whereas payment had already been made on 29.2.1988 without getting it pre-checked. As per the prevalent rule, payment is made to the contractors only after pre-check, but in order to conceal the wrong payment, you have made the payment secretly after keeping your senior officers in dark which, in all respects, indicates your malafide intention. The Superintending Engineer too had ordered to make payment of 50 per cent amount only for this work and you have been found responsible for it.

25. Receipt of the letter of the Superintending Engineer dated 17.3.1988, which depicts that in relation to payments already made he had no knowledge and by which 50% payment was directed to be made, was served upon the writ petitioner-respondent was not attempted to be established despite denial by the writ petitioner-respondent in no uncertain terms of the receipt thereof.

26. The insinuation in the charge was that by reason of pre-check, senior Officers become aware of payments which are to be made. The writ petitioner-respondent in his representation against the enquiry report in no uncertain terms said that pre-check is done by the Accounts Officer. The Accounts Officer is, no doubt, not senior to the Executive Engineer, but the Accounts Officer is required at the time of pre-checking to inform senior Officers about payments to be made was not brought on record. Therefore, because pre-check was not done, the senior Officers were kept in dark; there is no evidence at all.

27. It is true that pre-checking was not done as the said fact stands admitted, but, as aforesaid, by reason of non pre-checking, senior Officers were kept in dark, there is no material at all upon which one can conclude that the said charge stands proved.

28. The last charge against the writ petitioner-respondent was as follows:

At page 53 of Measurement Book No. 278, a sum of Rs. 3,37,183.00 has been deducted from the bill without showing any reason and again the same has been returned without showing any reason. As per rule, ban has been imposed on such type of "keep back" and deduction of money and returning of the same without stating any reason shows ulterior motive, for which you are held fully

guilty.

Thus, the misappropriation of Government fund has been committed by you without any purpose under a conspiracy. You have been found fully guilty for such irregular acts.

29. To our mind, this is no charge at all. It had not been communicated what restrictions are there to withhold payments due to a contractor. The enquiry report does not refer to any rule or circular imposing any such restriction. Keeping back a part of the amount due on account of a work done on a contract and releasing the same subsequent thereto would only suggest that the work was not being done to the satisfaction of the executing authority and later the executing authority being satisfied, the payment was released. Any other meaning to such an action cannot be ordinarily inferred and it has not been indicated in the charge what other inferences could be drawn.

30. We would, therefore, conclude in the same manner as had been concluded by the learned Single Judge, while allowing the writ petition that there are no materials on record to put home the charges. What the learned Single Judge meant while using the word "witnesses", was "materials". The fact remains that no materials were brought on record of the enquiry proceedings to put home the charges.

31. In those circumstances, while we dismiss the appeal, we declare that for the illegal order of dismissal, the writ petitioner-respondent was prevented from discharging his duties attached to the post held by him. Accordingly, not only the writ petitioner-respondent should be reinstated from the date of the order of dismissal, but he should also be paid all his lawful remunerations from the date of his dismissal until the date of his retirement.

32. In as much as the learned Single Judge has quashed the enquiry report as well as the order of the disciplinary authority dismissing the writ petitioner-respondent from his services, which order we have upheld in this appeal, we direct the disciplinary authority in discharge of its obligation under Rule 97 of the Bihar Service Code to determine at the time of reinstating the writ petitioner-respondent what remunerations the writ petitioner-respondent is entitled to for the period he was under suspension over and above subsistence allowance paid to him strictly in accordance with the provisions contained in Rule 97 of the said Code. This exercise must be done as quickly possible as but not later than three months from today.

33. In view of what has been stated above, appropriate action should also be taken for finalization of the retrial dues and claims of the writ petitioner-respondent at an early date.