

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5995 of 2015

Dinesh son of Late Sukhendara Thakur, resident of Village- Sutihara, P.S. Parihar, District- Sitamarhi.

... .. Petitioner/s

Versus

1. The State Of Bihar and Ors
2. The Principal Secretary,. Department of Finance Old Secretariat Bihar, Patna.
3. The Officer on Special Duty - cum- Director Press Finance Department of Finance Old Secretariat Bi
4. The Joint Secretary, Finance Department of Finance Old Secretariat Bihar, Patna.
5. The Additional Secretary, Finance Department of Finance Old Secretariat Bihar, Patna.
6. The Deputy Secretary, Finance Department of Finance Old Secretariat Bihar, Patna.
7. The Superintendent, Press and Forms, Gaya
8. The Deputy Superintendent, Press and Forms Gaya.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr.Ajey Kumar
For the Respondent/s : Mr.Himanshu Kr. Akela, AC to PAAG2

CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD
ORAL JUDGMENT

Date : 21-06-2019

Heard counsel for the petitioner and counsel for the respondents-State.

Petitioner being employee in Press and forms, Gaya and member of workers union was proceeded against on the basis of charge memo dated 24.08.2013. Same was containing three charges. Substance of charges no. 1 and 2 was that the petitioner had remained continuous absent from 07.04.2009 till date of issuance of charge memo i.e. 24.08.2013. Third charge was



alleging that as a result of his absence from duty, members of the cooperative society had indulged in misappropriation of huge amount. Enquiry officer proceeded to hold an enquiry. Petitioner participated in the enquiry before Enquiry officer. The stand of the petitioner is that on account of his being Joint secretary of Mazdoor union, he has been victimized by the authorities because he was taking up the grievance of grade IV employees within department. It is his submission that from 31.03.2010 till 23.01.2011 petitioner was under suspension. In the circumstance allegation made in the charge memo is also unsustainable since period between 31.03.2010 till 23.01.2011, being period of suspension cannot be treated as period of absence from duty. The Enquiry officer on the basis of material concluded that charge no.3 could not be proved against the petitioner. The enquiry report containing said conclusion is dated 20.11.2013. Petitioner thereafter was served with second show cause notice dated 11.03.2014 issued by the disciplinary authority. Petitioner submitted his reply to the second show cause notice on 29.03.2014. In response to second show cause notice, petitioner has submitted a detailed and elaborate reply. Petitioner has taken stand before the authority that he has been made victim on account of his activity in the union and otherwise denied all charges. He



has submitted that since he was Joint secretary of the union, he was being given threat to his life and in the circumstance he had requested the authorities for transfer. The authorities had not heeded to his request and therefore, petitioner cannot be held responsible for absence, if any, which was under very compelling circumstance where he was facing threat to his life.

Whether the authorities propose to accept the mitigating circumstance raised by the petitioner or not is within realm of their discretion on which this court would not make any observation. If the petitioner is able to make out mitigating circumstance surely authorities would consider the same.

Rather than considering the issue raised by the petitioner disciplinary authority has proceeded to dismiss the petitioner from service by exercising power under rule 76 of the Bihar Service Code. Very premise of such decision is factually unsustainable. Rule 76 of the Bihar Service Code contemplates that where an employee absents himself from duty unauthorizedly for a period of five years or more continuously, then after complying with principles of natural justice action may be taken for dismissal.

In the instant case, at best, on the basis of allegation made in charge memo petitioner was allegedly absent from duty



from 07.04.2009 till issuance of charge memo dated 24.08.2013 which is much less than five years.

Admittedly, petitioner had participated in the proceeding. Therefore, after service of charge memo dated 24.08.2013, it cannot be concluded that the petitioner has been continuously absent from service. However, disciplinary authority while dismissing the petitioner has deemed the petitioner to be absent from 07.04.2009 till 23.06.2014 i.e. date on which disciplinary authority has passed the order of punishment in purported exercise of power under rule 76 of the Bihar Service Code. Such finding is at variance with the charges for which the petitioner was proceeded against. Charge memo alleged absence from 07.04.2009 till 24.08.2013, i.e. the date of the charge memo. Findings of the disciplinary authority is of unauthorized absence from 07.04.2009 till 23.06.2014. Finding is in respect of a period for which there was no charge and for which there was no enquiry. In view of the law laid down by the Apex Court in the case of M.V. Bijlani vs. Union of India and others reported in 2006(5) SCC 88. Such findings for which there was no charge cannot be sustained. Paragraphs 12, 13 and 14 are quoted hereunder:-

12. Mr Kailash Vasudev, learned Senior Counsel appearing on behalf of the appellants, has taken us through the report of the enquiry officer and submitted that on reading thereof in its entirety, it would appear that the enquiry officer misdirected himself in arriving at the finding of guilt against the



appellant without considering the nature of the charges levelled against the appellant.

13. Mr N.K. Verma, learned counsel appearing on behalf of the respondents, however, supported the impugned judgment. It was pointed out that the witnesses examined on behalf of the department stated that ACE-8 Register was not being maintained in a register and kept in loose sheets and kept in the estimate files separately. It was furthermore submitted that the appellant had not been able to prove theft of copper wire and as the allegation against the appellant was that the copper wire "amounting to 24 miles single wire" was missing and the entire onus was on him to prove the utilisation thereof.

14. From a perusal of the enquiry report, it appears to us that the disciplinary authorities proceeded on a wrong premise. The appellant was principally charged for non-maintenance of ACE-8 Register. He was not charged for theft or misappropriation of 4000 kg of telegraph copper wire or misutilisation thereof. If he was to be proceeded against for misutilisation or misappropriation of the said amount of copper wire, it was necessary for the disciplinary authority to frame appropriate charges in that behalf. Charges were said to have been framed after receipt of a report from CBI (Anti-Corruption Bureau). It was, therefore, expected that definite charges of misutilisation/misappropriation of copper wire by the appellant would have been framed. The appellant, therefore, should have been charged for defalcation or misutilisation of the stores he had handled if he was to be departmentally proceeded against on that basis. The second charge shows that he had merely failed to supervise the working of the line. There was no charge that he failed to account for the copper wire over which he had physical control.

Relevant conclusions in this regard recorded by disciplinary authority are being reproduced herein below:-

“उपर्युक्त से यह स्पष्ट होता है कि श्री दिनेश मजदूर दिनांक— 07.04.09 से लगातार 5 वर्षों से अधिक अवधि से अपने कार्यालय से आज तक अनाधिकृत रूप से अनुपस्थित हैं। यहाँ तक ही निलंबन की समाप्ति के उपरांत भी कार्यालय में मात्र योगदान देकर लगातार अनुपस्थित रहे जो इनके कार्य के प्रति लापरवाही एवं आदेश की अवहेलना को स्वतः प्रमाणित करता है।”

Clearly on the basis of erroneous assumption that the petitioner is absent till date of passing of the order, disciplinary authority has concluded the period of absence of more than five



years. Actually period of the petitioner alleged absence in charge memo was much less than five years as taken note of hereinabove. The factual legal position for exercising power under rule 76 of the Bihar Service Code therefore, does not exist in this case even as per allegation made in the charge memo, the order of disciplinary authority is thus not sustainable in the eye of law as the petitioner has been dismissed in purported exercise of power under rule 76 of the Bihar Service Code.

The order of the disciplinary authority dated 23.06.2014 for reasons indicated hereinabove is thus quashed. Petitioner had also moved appellate authority against the order of punishment and appeal of the petitioner had been rejected by order dated 17.04.2015. During pendency of instant writ proceeding illegal order of disciplinary authority has been confirmed by the appellate authority. The order of the appellate authority is also unsustainable and must collapse. The order of the appellate authority is also quashed. Matter is remitted back for fresh consideration to disciplinary authority.

Let such consideration be done by Disciplinary Authority in accordance with law expeditiously and without any undue delay. Petitioner would also be under legal obligation to extend full cooperation for expeditious decision by the disciplinary



authority. As a result of quashing order of punishment, petitioner would be deemed under suspension and entitled to get benefit accordingly.

Writ petition is allowed with directions to the extent indicated hereinabove.

(Madhuresh Prasad, J)

s.hassan/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	29.6.2019
Transmission Date	NA

