

Rajendraprasad Shukla S/O Sureshwar ... vs Chairman, Coal India Limited, Kolkatta ... on 6 February, 2019

Author: Rohit B. Deo

Bench: P.N. Deshmukh, Rohit B. Deo

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO.1463 OF 2017

Rajendraprasad Shukla s/o Sureshwar Shukla,
Aged about 55 Years,
Working as Chief Manager (Finance),
Western Coalfields Limited, Coal Estate,
Civil Lines, Nagpur, R/o B-3/03, Rachna
Sayantara Phase-I, Hazari Pahad,
Seminary Hills, Nagpur -400007.

.... PETITIONER

VERSUS

- 1) Chairman,
Coal India Limited, Coal Bhawan,
New Town, Rajarhat, Kolkatta,
(West Bengal).
- 2) Chairman & Managing Director,
Western Coalfields Limited,
Coal Estate, Civil Lines, Nagpur-400001.
- 3) Shri Prabir Kumar Bose,
Enquiry Officer,
Retd. General Manager (Finance),
SECL, Flat No.502, Swapnil Shrava,
61, Shivaji Nagar, Nagpur.

.... RESPONDENTS

Shri M.M. Sudame, Counsel for the petitioner,
Shri A.M. Ghare, Counsel for respondent 2,

None for respondents 2 and 3.

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CORAM : P.N. DESHMUKH AND
ROHIT B. DEO, JJ.
DATED : 6th FEBRUARY, 2019

ORAL JUDGMENT : (PER : ROHIT B. DEO, J.)

The petitioner, who is working as Chief Manager (Finance) at the Western Coalfields Limited (WCL) at Nagpur, is assailing the order dated 02-5-2016 of the Chairman and Managing Director, WCL (Disciplinary Authority) of reduction to one stage lower in time scale for one year and the appellate order dated 19-1-2017 of the Chairman and Managing Director, Coal India Limited dismissing the appeal.

2. The petitioner contends that he served with Coal India Limited and its subsidiary company WCL from June 1986 to February 2015 with distinction. The petitioner was appointed as Accounts Officer E-2 Grade in 1986 and was lastly promoted as Chief Manager (Finance) E-7 Grade in 2012.

3. The petitioner was served with memorandum of charge- sheet dated 05-3-2015. The challenge to the disciplinary action is predicated on the assertion that no misconduct is made out on the face of the record. In the context of the challenge, we may note the gravamen of the allegations. Article-I alleges that the petitioner, while 3 wp1463.17 functioning as Area Finance Manager, Wani North Area, WCL during 2012-13, committed gross misconduct by abusing his official position and showed undue favour to Shri Sandeep Singh Arora, Director of M/s. BNS. Infrastructure Private Limited, Nagpur by accepting forged bank guarantee against the retention money and not following the guidelines as per the CMC Manual with regard to acceptance of bank guarantee against retention money. Article-I further reads thus :

"That a note was put up by Shri P.K. Mishra, the then Staff Officer (Mining) on 18-01-2013 to Area General Manager, Wani North Area through Area Finance Manager Shri R.P. Shukla, Wani North Area for adjusting the excess 5% amount received through B.G. towards non-deduction of Retention Money which was against Clause 3.07, sub-clause 30.3 of CMC Manual.

That Shri R.P. Shukla, AFM had accepted the irregular proposal and simply forwarded the note without raising any objection regarding acceptance of Bank

Guarantee against the Retention Money. As per the CMC Manual 3.07 (Clause 30.3) it is clearly mentioned that "Retention Money should be deducted at 5% from running bills. Total of Performance Security and Retention Money should not exceed 10% of annualized value of contract amount or lesser sum indicated in the bid document."

That, Shri R.P. Shukla, failed to raise any query with regards to deduction of Retention Money @ 5% from the Running Bills and irregularly allowed acceptance of BG against retention money. However, deduction of 5% from the running bill was mandatory for retention money and the CMC Manual does not mention acceptance of Bank Guarantee against non-deduction of Retention Money."

4 wp1463.17 Article-II reads thus :

"That, the said Shri R.P. Shukla, Chief Manager (Finance), Wani North Area, WCL while functioning as Area Finance Manager, Wani North Area, WCL during 2012-13, committed gross misconduct by abusing his official position and showed undue favour to Shri Sandeep Singh Arora, Director of M/s. BNS Infrastructure Pvt. Ltd., Nagpur by accepting a forged Bank Guarantee against Performance Security and Retention Money due to which the total extent and nature of actual wrongful loss caused to the WCL on account of cancellation of Work Order arising out of submission of forged Bank Guarantee comes to Rs.2,41,13,928.95 (Actual Loss for non-deduction of retention money @ 5% from running bills = 22,53,606.95 + Liquidated damage = 72,86,774.00 + Total Penalty @ 10% of the contract value claimed = 1,45,73,548 i.e. total Rs. 2,41,13,928.95)"

4. It is discernible from the statement of imputation as regards charge Article-I, that the fake bank guarantee dated 28-12-2012 was submitted by the contractor in the Wani North Area Office vide a letter addressed to the General Manager, Wani North Area, WCL signed by one Rishi as Authorised Signatory. On 18-1-2013 a note was put up by Shri P.K. Mishra, Staff Officer (Mining) to Area General Manager, Shri K.B. Majhi through the petitioner-Area Finance Manager for adjusting the excess amount received through the bank guarantee towards non-deduction of retention money. The note records that the bank guarantee is given towards performance security 5 wp1463.17 and retention money and that confirmations have been received from the concerned bank with regard to the bank guarantee and extension thereof till 31-1-2014 vide confirmation letter dated 16-1-2013. Shri P.K. Mishra mentions in the note that the bank guarantee against the performance security and retention money deposited may be accepted so that the work order can be issued and agreements executed. The note was put up to the Area General Manager, Wani North Area through the petitioner-Area Finance Manager, Wani North Area. Of some relevance is the part of the statement of imputation as regards charge Article-I which is reproduced below :

"The Finance manual, Vol-I, Part-II issued by Coal India Ltd. The relevant Clause 13(1), it is the duty of the executive authority to verify and accept the Bank Guarantee. The Clause 13(1) of the Finance manual speaks as under :

The Executive authorities concern shall after examination and acceptance send the documents (BG) to the concerned Accounts Officer. The security relating to the Area should be sent Area Accounts Officer/AFM concerned , those pertaining to Headquarters to the Accounts Officer (Cash) and those pertaining to the sales office to the sales accounts department, for record and custody of the security.

That, the letter given by the authorized signatory of M/s. BNS Infra - KBS JV Shri Rishi has not mentioned any details regarding non-deduction of Retention Money from the running bills.

That Shri R.P. Shukla, AFM had simply forwarded the note

6 wp1463.17 dated 19-01-2013 without raising objection regarding acceptance of Bank Guarantee against the deduction of Retention money from the running bills. As per CMC Manual 3.07 (Clause 30.3) it is clearly mentioned that "Retention Money should be deducted at 5% from running bills. Total of Performance Security & Retention Money should not exceed 10% of annualized value of contract amount or lesser sum indicated in the bid document. That, Shri R.P. Shukla also failed to raise any query, on the note of Staff Office (Mining) why M/s. MNS Infra submitting BG for Rs.1,45,73,548/- instead of Rs.72,86,774/- as demanded in the LOA which ultimately resulted in irregular acceptance and approval of this forged BG by Area General Manager, Wani North Area."

It is an admitted position that under the Finance Manual and particularly Clause 13(1), the duty to verify and accept the bank guarantee is that of the Executive Authority. It is not in dispute that the petitioner was not the Executive Authority and was not responsible to verify and accept the bank guarantee. The petitioner is blamed for simply forwarding the note put up by Shri P.K. Mishra without raising objection regarding the acceptance of bank guarantee against the deduction of retention money from the running bills. The statement of imputation proceeds on the premise that the petitioner had reason to believe that there is some irregularity in the acceptance of the bank guarantee and was duty bound to raise an objection. Irrefutably, the petitioner was neither the authority to verify and accept the bank 7 wp1463.17 guarantee nor was authorized to take decision on the note put up by Shri P.K. Mishra to the Area General Manager, Shri K.B. Majhi.

The statement of imputation as regards charge Article-II reads thus :

"That during the period 16-01-2013 to 31-05-2013, M/s. BNS Infra-KBS has raised around 20 bills for payment towards their work completed from time to time. WCL Ghonsa OCM has paid an amount totaling to Rs.4,50,72,139/- (Gross Amount) and after deduction the net payment made to the party comes around Rs.4,13,84,173/-. The retention Money @5% was to be deducted from the running bills as per the CMC Manual Clause 30.3. Thus due to non-deduction of the retention money from the running bills @ 5% comes to Rs.22,53,606.95. It is evident from the fact mentioned above that WCL had to incur a loss of Rs.22,53,606.95 due to non-deduction of the Retention Money, which was mandatory.

That as per Show Cause Notice issued to Shri Sandeep Singh Arora, Director of M/s. Baba Nanak Sars Infrastructure Pvt. Ltd. the WCL has raised a claim/penalty of Rs.1,45,73,548/-. A maximum penalty of 10% of the total Contract value as per clause 6.2 of General Terms and Conditions of Notice Inviting Tender (NIT) is imposed on the contractor. As per the Show Cause Notice the WCL has also claimed liquidated damage equivalent to 5% of the contract value or the amount of security deposit/performance bank guarantee whichever is higher as per clause 2 of Section 4 Integrity Pact. The amount calculated for the liquidated damage is Rs.72,86,774/- @ 5% of the contract value.

That the total extent and nature of actual wrongful loss caused to the WCL in acceptance of forged BG and the notional loss caused to WCL on account of cancellation of the work order arising out of submission of the forged BG comes

8 wp1463.17 to Rs.2,41,13,928.95 (Actual Loss for non-deduction of retention money @ 5% from running bills = 22,53,606.95 + Liquidated damage = 72,86,774.00 + Total Penalty @ 10% of the contract value claimed = 1,45,73,548 i.e. total Rs.2,41,13,928.95)."

5. The petitioner denied the charges vide reply dated 16-3-2015. The petitioner pointed out that he merely forwarded the note put up by Shri P.K. Mishra, Staff Officer (Mining) to the Area General Manager, Wani North Area, for administrative decision as per the existing procedure. The petitioner contended that the bank guarantee was duly verified for its acceptance by the Staff Officer (Mining) and the Finance Manual mandates that the Executing Officer i.e. the Area and Contract Management Cell headed by the Staff Officer (Mining) is obligated to verify the bank guarantee and to forward the bank guarantee to the Finance Department only for its safe custody. The petitioner highlighted the irregularities and deviation from procedure in the finalization of tender and dealt with the allegation that he did not raise an objection to the note put up by Shri P.K. Mishra thus :

"Regarding forwarding note sheet to the Area General Manager, without any query my submissions are as follows :-

a. It is purely administrative matter.

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b. The note sheet was for acceptance of Bank Guarantee

and the relevant clause 13(1) of the Finance Manual, Vol-I, Part-II it is the duty of the executive authority to verify and accept the bank guarantee and manual speaks as under "The Executive authorities concerned shall after examination and acceptance

send the document (BG) to the concerned Accounts Officer. The security relating to the Area should be sent to Area Accounts Officer/AFM concerned, those pertaining to Headquarters to the Accounts Officer (Cash) and those pertaining to the sales office to the sales accounts department for record and custody of the security.

Hence, AFM is only the custodian of the Bank Guarantee and has no role in its examination and acceptance. The responsibility of examination and acceptance of Bank Guarantee is vested with the executive authority which in this case is Staff Officer (Mining). It is his responsibility to examine and accept whether Bank Guarantee is as per CMC manual or not. In this regard duties and responsibilities of Area General Manager, Area Finance Manager, Staff Officer (Mining) sought by Inspector of Police CBI/ACB, Nagpur vides PEO2820130001/1316 dt. 13-03-2014 is enclosed for ready reference.

C. There is no procedure prescribed in CMC Manual to process such note sheet before issue of work order and to the best of my knowledge no such system exists in any of the areas including HQ. Even in the case of Wani North Area in case of E&M, Civil etc., the work order is directly issued after verification of BG by the concerned department. Presently, the processing of such note sheet is dispensed with as it is not prescribed procedure. Hence, the cognizance of the said note sheet should not have been taken.

D. On the question of irregular acceptance and approval 10 wp1463.17 of this BG by AGM, WNA, I would like to state that Shri K.B. Majhi before taking charge as Area General Manager, two and a half months back was working as GM (Opm)/Staff Officer (Mining), WNA for the last 2 years (approx) and was supposed to be familiar with CMC Manual thoroughly and well conversant and had signed the note sheet with full consciousness. It is very much surprising to note that his name appears in the management witness and has been exonerated, although he has signed the same note sheet along with the undersigned. It appears to be discriminatory. I also deserve the same immunity as extended to Shri K.B. Majhi.

e. Moreover, in course of conducting transaction audit for said period in respect of Wani North Area by Comptroller and Auditor General of India (C&AG) who are known to be expert in the field, had not raised any adverse remark regarding adjustment of five percent retention money against bank guarantee Para No.I of Part-IB (Extract of Same Enclosed) Hence, the allegations leveled are not correct and totally false and frivolous."

6. The reply of the petitioner to the statement of imputation as regards charge Article-II reads thus :

"In respect of above the undersigned is in a constraint to submit the following few lines for your perusal, since it is felt that the undersigned has been implicated to save the helm of affairs and other higher officials :-

1. As per Finance Manual clause (13)¹ the area Finance Manager is the only custodian of Bank Guarantee and not the accepting authority. So, above charges that I have accepted forged bank guarantee does not arise and completely baseless and

fabricated.

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2. Performance security is taken from the contractor to ensure the performance, similarly retention money is deducted from the running bill and is returned to the contractor after completion of work. So, both the performance guarantee and retention money relates to the performance of the contractor and these are not the source of income to the company. The work order has not been cancelled on account of non performance. It has been cancelled due to fake papers like experience, BG etc., as mentioned by GM (CMC), WCL-HQ vide his letter no. WCL/GM (CMC)/2013/1229 dt. 19-10-2013 (Copy enclosed).

So, there is no actual loss to the company, as mentioned in the Article-II.

3. Measurement and payment as per Clause 8.8 of the CMC Manual stipulates that the company can recover any over payment from the subsequent bills under the contract, failing that from the contractors claim under any other contract with the company or from the contractor security deposit or the contractors shall pay the amount of over payment on demand. So, the retention money amounting to Rs.22,53,606.95/- can be easily adjusted from the pending bills due to the contractor which is Rs.35 Lakhs (approx.) so, there is no question of loss to the company on account of retention money. Further, the liquidated damages and penalty does not fall under the ambit of loss.

4. Further in course of conducting Transaction Audit by C&AG, the auditor has pointed out serious lapses in scrutiny and finalization of tender documents as detailed below :

a. Seeking clarification of about the experience before the floating of NIT.

b. Disqualifying the qualified and reputed contractor on the minor ground by setting aside legal opinion given by company's panel advocate.

- c. Not taking TDS certificates as per NIT.
- d. False hiring agreement signed by the same

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- e. person both as hirer and hiree.
- f. Ignoring the adverse legal opinion about the documents submitted by M/s. BNS-KBS (JV).
- f. Non submission of details of ongoing/completed work in CIL/WCL.
- g. Violating the natural justice by giving only 3

days time to M/s Avatar & Co., Nagpur and 7

days time to M/s BNS Infrastructure Pvt. Ltd., Nagpur for clarification. Both the tenderers are Nagpur based.

The concluding remark of C&AG is quoted below :

Quote :-

"Thus the bidder M/s BNS-KBS(JV), despite of many deficiencies and doubts of genuineness of the documents was awarded the contract. The incidents like obtaining confirmation of experience much ahead of floating of tenders, calling for hiring agreement from M/s. Avtar & Co. after one month for the decision to disqualify the bidder M/s, Avtar & Co., just as formality without giving him sufficient time to respond, considering the bidder M/s. BNS-KBS(JV) as eligible despite of legal opinion, it appears that the tender committee had favoured and awarded the contract to M/s. BNS- KBS(JV). All the doubts of genuineness were proved correct when the BG had resulted as fake."

"Thus improper of contract by improperly eliminating the other bidder (M/s. Avatar Singh) who was performing well in WCL and favouring the fraudulent tenderer had resulted in financial loss of Rs.1.49 crore and avoidable litigation to company. This not only needs to be investigated but adherence of strict principle in finalization of tender needs to be adopted in WCL."

Unquote :-

From the C&AG report, it is amply clear that unreasonable favour has been extended by the Permanent Tender Committee subverting the laid down procedures of 13 wp1463.17 the Company and the Tender Committee comprises of AGM, WNA, GM (Prodn), GM (CMC), GM(Finance) and DT(OP) and subsequent approving authority.

Sir, undersigned joined WCL in June 2012 after being transferred from SECL. In the SECL twice I have been awarded as the Best Area Finance Manager for my performance. Even in the WCL: while working as AFM a lot of improvement has been made in the working of finance and accounts and same has been appreciated vide letter Dt. 27-05-2013 GM(F), WCL (copy enclosed). I have always tried to protect the interest of the company.

In fine, had the fraudster Contractor would have been nipped in the bud itself, knowing well about his ineligibility not only with the documents submitted but also through the legal opinion submitted by the Panel Advocate and had the Area General Manager would have exercised within the power delegated to him and forwarded the proposal moved by Staff Officer (Mining) for approval by Competent Authority, the alleged incidents would have been averted. To my conscience, & to make prevail the truth, natural justice with liberty and equity, in a constraint to state that to save the helm

the undersigned is implicated and legally to divert the case and save the helm even after filing FIR with State Police, the case was forwarded to CBI, who could not proceed when the case is dealt by State Police and till date the helm is not making necessary arrangement for booking the fraudster under the rule or laws of the land."

7. The Enquiry Officer returned finding of guilt on both charges and the reasons recorded are thus :

"After analyzing the defence brief the undersigned has come to the following conclusion :

1. It is a fact that forged Bank Guarantee has been 14 wp1463.17 submitted the verification of which was the duty of the executing authority.
2. It is also a fact that a note was moved by the SO(M), Wani North Area, Shri P.K. Mishra, giving the details of the Bank Guarantee and stating that BG of Rs.1,45,73,548 which is exactly double the amount and also stating the BG be accepted in lieu of retention money being deducted. The note was duly vetted by AFM, Wani North Area without any comments and forwarded to AGM, Wani North Area for approval. Thereafter work order was issued and retention money was not deducted by the Sub-Area concerned.

The Charged Officer is according to my opinion is guilty of the both the Article of Charges against him because of the following reasons :-

1. As finance head of the Area he vetted the irregular note moved by SO(M), Wani North Area without objecting, examining or returning the note.
2. He is also guilty of the Article of Charge-II regarding the loss incurred by the company to the following extent -
 - (a) Due to accepting and forwarding the irregular note (D-5) resulted in non-deduction of retention money @5% amounting to Rs.22,53,606.95.
 - (b) The Charged Officer by vetting the irregular note put by SO(M), Shri P.K. Mishra became a party to the following losses:-

(1) 10% penalty as per Clause 6.2	-	
Rs.1,45,73,548-00		
(2) LD as per integrity pact.	-	Rs.
72,86,774-00		
(3) Total loss to the company	-	
Rs.2,41,13,928-95		

In my opinion as the Finance head of the Area and associate Finance of AGM, Wani

North Area had the Charged Officer exercised due care in dealing with the note submitted by SO(M), Wani North Area by raising questions 15 wp1463.17 and returning the note sheet the entire episode may have been avoided. The entire matter was dealt by the Charged Officer in a very casual manner which resulted in this fraud taking place."

8. The Enquiry Officer concurred with the submission of the petitioner that the verification of the bank guarantee was the duty of the Executing Authority, which the petitioner admittedly was not. The Enquiry Officer records that the note moved by the Staff Officer (Mining) Shri P.K. Mishra was duly vetted by the petitioner "without any comment" and forwarded to the Assistant General Manager, Wani North Area for approval. The petitioner is held guilty on the premise that as the finance head of the area he vetted the irregular note moved by the Staff Officer (Mining) without any objection or examination. This is also the basis for the finding of guilt as regards charge Article-II.

9. The short submission of the learned Counsel for the petitioner Shri Mohan Sudame is that the record of the enquiry, on the face of it, does not make out a case of misconduct. The submission is, and on facts there does not appear to be in dispute, that the petitioner was neither the Executing Authority charged with the responsibility to verify or accept the bank guarantee nor was the petitioner a member of the Tender Committee nor was the petitioner authorized to take any 16 wp1463.17 decision on the note forwarded by Shri P.K. Mishra, the Staff Officer (Mining). The note was put up by Shri P.K. Mishra and was forwarded by the petitioner without any comment to the decision making authority Assistant General Manager, Wani North Area. Shri Mohan Sudame, learned Counsel would submit that in the factual matrix, there is no error of judgment or negligence inasmuch as there was no reason for the petitioner to believe that the bank guarantee was fake nor was the decision making on the note or any part thereof in the domain of the authority of the petitioner. Shri Mohan Sudame, learned Counsel would submit that even if it is assumed *arguendo* that the petitioner committed an error of judgment, the error would not be a misconduct. Shri Mohan Sudame, learned Counsel would emphasize that there is no material on record to suggest that the petitioner had any reason to believe that the bank guarantee submitted is fake or that note put up by the Staff Officer (Mining) is suggesting a course of action which is fraught with risk to the employer or which is *ex facie* irregular or fraudulent and that the petitioner was expected, by the nature of the assignment which he was holding, or in view of any service rule or regulation or manual or duty list, to make any further or probing enquiry or to return the note, decision upon which was in the exclusive domain of the Assistance General Manager to whom the note was 17 wp1463.17 addressed. Shri Mohan Sudame would submit that even if the bar is raised infinitely and the standard of efficiency is stretched to the extent of expecting an employee in the Finance Department to instinctively smell something fishy, the failure to meet the bar would hardly be a misconduct. Shri Mohan Sudame, learned Counsel would invite my attention to the decision of the Hon'ble Apex Court in *State of Punjab and others v. Ram Singh Ex-Constable*, (1992) 4 SCC 54 and in particular to the following observations.

"6. Thus it could be seen that the word 'misconduct' though not capable of precise definition, on reflection receives its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may

involve moral turpitude, it must be improper or wrong behavior, unlawful behavior, willful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to the scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline. Laxity in this behalf erodes discipline in the service causing serious effect in the maintenance of law and order."

10. We have heard the learned Counsel Shri A.M. Ghare for the Western Coalfields, at length. We noticed from the record that while the petitioner is punished for allegedly not raising objection to 18 wp1463.17 the note moved by Shri P.K. Mishra, the Staff Officer (Mining), the Assistant General Manager Shri K.B. Majhi to whom the note was addressed and who apparently took the decision thereupon has not been proceeded against departmentally. In response to our query, Shri A.M. Ghare, learned Counsel states that as a fact no departmental action is initiated against the decision making authority who acted on the note put up by Shri P.K. Mishra. We asked Shri A.M. Ghare, learned Counsel to explain the logic or rational, if any, in proceedings against the petitioner who simply forwarded the note without any comment to the decision making authority, the Assistant General Manager and not initiating any action whatsoever against the decision making authority who acted on the note. Shri A.M. Ghare, learned Counsel states that the rational is that the first vetting officer has a higher degree of responsibility. We are not impressed by the explanation. Perusal of the record of the enquiry proceedings has left us with the disturbing feeling and impression that the petitioner is made a scape goat. Concededly, the petitioner was not the authority to verify or accept the bank guarantee nor was a member of the Tender Committee, nor was the authority to take the decision on the note put up by Shri P.K. Mishra. The fact that no action is initiated against the decision making authority who acted on the note put up by Shri P.K. 19 wp1463.17 Mishra and the petitioner is punished for the alleged failure to raise an objection to the note is glaringly arbitrary, particularly since we have not come across any material to show that the petitioner had any reason to believe that the course suggested in the note was grossly irregular or that the petitioner was otherwise required to do more elaborate and searching enquiry into the factual foundation for the note.

11. Shri A.M. Ghare, learned Counsel would rely on the decision of the Hon'ble Supreme Court in Union of India and others v. J. Ahmed, (1979)2 SCC 286 and in particular to the observations in paragraphs 9,10,11 and 12:

"9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, charge 2 refers to the quality of lack of leadership and charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and they may be very relevant while considering whether a person should be promoted to

the higher post or not or having been promoted, whether he should be retained in the higher post or not or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function 20 wp1463.17 attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words 'acts and omission' contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 ('Conduct Rules' for short). The Government has prescribed by Conduct Rules a code of conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding a responsible post or lack of aptitude or qualities of leadership would not constitute failure to maintain devotion to duty. The expression 'devotion to duty' appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character of personal 21 wp1463.17 ability would not constitute misconduct for the purpose of disciplinary proceedings.

10. It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the Government

servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct [see *Pierce v. Foster*]. A disregard of an essential condition of the contract of service may constitute misconduct [see *Laws v. London Chronicle (Indicator Newspapers)*]. This view was adopted in *Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur*, and *Satubha K. Vaghela v. Moosa Raza*. The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct".

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik*, in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In *S. Govinda Menon v. Union of India*, the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in *P.H. Kalyani v. Air France*, 22 wp1463.17 Calcutta, wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil [see *Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co-op. Department Stores Ltd.*]. But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

12. The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving 23 wp1463.17 some form of guilty mind or mens rea. We find it

difficult to subscribe to this view because gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings."

The reliance on the said decision is in view of the observation in paragraph 12 that the misconduct may not necessarily involved mens rea and that gross or habitual negligence in performance of duty may not involve mens rea and may still constitute misconduct for disciplinary proceedings. The decision cited takes the case of the employer no further. No case of gross or habitual negligence in performance of duty is made out. Au contraire, the said decision reaffirms the settled position of law that lack of efficiency or attainment of highest standard in discharge of duty attached to the office would not ipso facto constitute misconduct.

12. We are satisfied that on the face of the record no case of misconduct is made out.

13. The punitive order dated 02-5-2016 in proceedings WCL/CMD/VIG/16/835 passed by the Chairman-Cum-Managing Director, Disciplinary Authority and the order dated 19-1-2017 in Appeal CIL/C5A(iv)/RPS/347/AA/42 passed by the Chairman-cum-

24 wp1463.17 Managing Director, Coal India Limited and Appellate Authority are quashed and set aside.

14. Rule is made absolute in the aforestated terms.

JUDGE

JUDGE

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