
(1991) 07 AHC CK 0061
In the Allahabad High Court
Case No : Writ Petition No. 8708 of 1988

Abdul Sattar Khan

APPELLANT

Vs

State of U.P.and others

RESPONDENT

Date of Decision : 09-07-1991

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1991) 07 AHC CK 0061

Hon'ble Judges : S.H.A.Raza, J

Final Decision : Allowed

Judgement

S.H.A. Raza, J.—The main contentions of the petitioner in challenging the order of removal dated 26988 contained in Annexure15 passed against him, are that the penalty of removal from service imposed upon him is not commensurate with the gravity of misconduct and the penalty was disproportionate to the gravity of the alleged misconduct and further that no loss of public exchequer by the petitioner was caused; and nonproduction of the witnesses against whom it was alleged that the petitioner had realised excess bus fair, would vitiate the order of removal.

2. It has been averred in the chargesheet dated 41186 issued against the petitioner that while the petitioner was posted at the counter of BarabankiFatehpur Booking counter in Qaiserbagh Bus Depot on 91086, upon an inspection made by Sri Abhinay Srivastava, Assistant Regional Manager, Qaiserbagh and Sri S.K. Gunjoo Traffic Superintendent, it was found that from 17 passengers, who intended to travel from Bus No. UTC 9493, on the route of Lucknow Fatehpur via Mati, the petitioner realised Rs 5 as bus fair instead of Rs. 4.40 p. and thus realised Rs. 10.20 p. excess fair from the passengers. Similarly he realised from 3 passengers Rs. 20 each as fair instead of Rs, 19.20 p., who were traveling from Lucknow to Fatehpur and thus realised Rs. 11 excess fair7 as a result of which the reputation of the department was tarnished. It was further averred in the chargesheet that on the same day the petitioner had realised from

22 passengers who were traveling in Bus No. URA 9586 from Lucknow to Fatehpur via Barabanki, Rs. 3.50 per passenger instead of Rs. 3.35. Similarly from one passenger who was travelling from Lucknow to Fatehpur, the petitioner realised Rs. 7.50 p. instead of Rs. 7.10 p. and thus he had realised Rs 3.70 p. in excess from the passengers and misappropriated the said amount. The said imputation of charges was based upon the report dated 101086 of Assistant Regional Manager, Qaiserbagh, Lucknow and the statement of the passengers.

3. The petitioner submitted an explanation before the Enquiry Officer, in which he stated that he had not realised any excess amount from any passenger. As small coins were not available, some of the passengers had left the small coins with the petitioner, which honestly, the petitioner deposited in the account of the department on 91086 and obtained a receipt of Rs. 15 on 10487. The said charge sheet was withdrawn but the orders passed by the General Manager indicated that this order of withdrawal of chargesheet would not affect the right of the department to proceed against the petitioner in any subsequent departmental proceedings. On 21487 another charge sheet more or less upon the same charges was again issued against the petitioner, which also indicated that the petitioner had realised Rs. 14.70 p. in excess of the bus fair.

4. During the course of the inquiry the following three witnesses were produced on behalf of the department:

1. Sri Abhinay Srivastava, Assistant Regional Manager.
2. Sri B.K. Tewari, conductor of Bus No. 9586.
3. Sri H.P. Nigam, conductor of Bus No. 9493.

5. In his statement Sri Abhinay Srivastava, Assistant Regional Manager who made inspection of the bus, stated that the petitioner had realised excess fair from the passengers. Sri B.K. Tewari stated that none of the passengers had told him that the booking clerk had realised excess fair from him. The statements of Sarvashri Rajendra Rastogi and Niwas Kushwaha were not taken before him and he put his signature under the influence of Sri Abhinay Srivastava. Sri H.P. Nigam another witness submitted that after the checking Sri Abhinay Srivastava had obtained his signatures.

6. None of the passengers from whom the petitioner was alleged to have taken excess fair were produced by the department during the course of departmental inquiry. The Enquiry Officer in his report has stated that none of the passengers inspite of several efforts, turned up to depose. He further mentioned in his report that nonproduction of the passengers would not affect the result of the inquiry for the reason of the fact that Sri Abhinay Srivastava, Assistant Regional Manager had recorded the statement of the passengers and there existed no reason why the deposition of Sri Abhinay Srivastava be discarded. He also repelled the argument of the petitioner that none of the passengers had made any complaint against him to any superior authority regarding charging of excess

fair from them by the petitioner, by stating that generally the passengers who board a bus are in hurry, they do not care to lodge a complaint as it takes a lot of time. He also stated in his report that after checking of the bus, the petitioner with a view to save his neck, had deposited the amount, which proves that he had realised excess fair and misappropriated the same. In his report he further stated that the withdrawal of the earlier chargesheet would not operate as estoppel to issue a fresh chargesheet.

7. The petitioner in this writ petition has also alleged that he has filed several writ petitions against the U.P. State Road Transport Corporation, which are still pending. One execution proceeding is also pending against the corporation, which he had initiated in Civil Court and hence the opposite parties have initiated the departmental proceedings against him with mala fide intention.

8. Hon'ble Supreme Court in the case of Bhagat Ram v. State of Himachal Pradesh and others reported in 1983 Supreme Court Cases (L&S) at page 342 indicated that the penalty imposed must be commensurate with the gravity of the misconduct and that any penalty disproportionate to the gravity of misconduct would be violative of Article 14 of the Constitution of India.

9. The only charge against the petitioner was that he had realised Rs. 14.70 p. as excess fair from the passengers. The explanation of the petitioner to the effect that he had not realised any excess fair and due to nonavailability of small coins, certain bus passengers left the small coins with the petitioner and boarded the bus. Undoubtedly a checking was made by two officers, who recorded statement of certain bus passengers, but during the course of the departmental inquiry they were not produced. There exists only one statement which was made by an officer during the course of inquiry, who made a checking and which has been relied upon by the Enquiry Officer. Admittedly no loss of public exchequer was caused. The excess fair was deposited by the petitioner on the same day. If it is assumed that the action of the petitioner was an afterthought one as he deposited the amount after the squad had made the checking and found from the passengers that the petitioner had realised excess fair, it has to be seen whether the penalty imposed upon is not commensurate with the gravity of misconduct and the penalty was disproportionate to the gravity of the alleged misconduct. The petitioner was charged for misappropriation of the Government funds. It was incumbent upon the department to have produced the passengers to prove that the petitioner had realised from them any excess fair.

10. In the case of Jagdish Prasad Singh v. State of U.P. and others, reported in 1990 LCD at page 567 this Court indicated as under:

?A perusal of the finding of the Tribunal would indicate that the nonexamination of some of the material witnesses was justified only on the ground that the witnesses were summoned by the Enquiry Officer but they failed to turn up and since some of them were no longer in service in the department, their appearance could not be compelled. If the petitioner wanted to rely on the

evidence of any of these witnesses it was open for him to have summoned and examined them in his defence during the enquiry but no effort in this direction having been made by the petitioner, it cannot be said that he was prejudiced in any manner as a result of nonappearance of these witnesses during enquiry. The Tribunal committed a manifest error of law by justifying the nonproduction of the material evidence. Undoubtedly the petitioner was charged for misappropriation of the government funds and embezzlement, but it was incumbent upon the prosecution to prove the charge beyond any shadow of doubt. Nonproduction of the witnesses for the reason that they were no more in service and their appearance could not be compelled is totally misconceived.?

11. In the instant case the Enquiry Officer has reported that inspite of issuance of several notices the witnesses did not turn up, hence they were not examined and only relying upon the report of Sri Abhinay Srivastava who made a checking, the Enquiry Officer found the petitioner guilty of committing misappropriation. This part of the finding of the Enquiry Officer is totally vitiated for the reason that if the witnesses would have been adduced the petitioner would have a right to crossexamine them to prove that he did not realise excess fare from them. In absence of any deposition by the passengers before the Enquiry Officer that the petitioner had realised excess fare from them, there existed no reason for the Enquiry Officer to have arrived at a finding that the petitioner had realised excess fare from the passengers.

12. The punishing authority agreeing with the report of the Enquiry Officer, by means of his order dated 26988 contained in Annexure15 imposed the extreme penalty of removal of the petitioner from service. While passing the order of removal the punishing authority failed to consider as to whether the penalty imposed was commensurate with the gravity of misconduct alleged to have been committed by the petitioner. He also ignored to consider as to whether the penalty was disproportionate to the gravity of misconduct alleged to have been committed by the petitioner. He also failed to consider that none of the passengers were produced before the Enquiry Officer to depose that the petitioner had realised excess fare from them. He also ignored to consider that it was incumbent upon the department to prove the charge beyond any shadow of doubt.

13. In view of the aforesaid reasons the entire inquiry proceedings as well as the order of removal is totally vitiated. As the material witnesses were not produced before the Enquiry Officer and the petitioner was deprived of the right to crossexamine them to prove his innocence, his defence was prejudiced and hence the order of removal suffered from malice of denial of reasonable opportunity and principles of natural justice.

14. It was vehemently argued by Mr. S.K Kalia, counsel for the opposite parties, that the petitioner had alternate remedy to approach the higher authorities of the U.P. State Road Transport Corporation by filing an appeal and filing a claim petition before the U.P. State Services Tribunal and hence the writ petition is not

maintainable.

15. The writ petition was filed in the month of October, 1988. Counter and rejoinder affidavits have also been filed. The matter has also been heard on merits as well. Undoubtedly, alternate remedy exists but at such a belated stage the plea of availability of alternate remedy cannot be raised. Furthermore in view of the fact that the impugned order of removal is non est, the question of availability of alternate remedy cannot be raised as a bar at this stage when the case has been heard on merits. The writ petition cannot be thrown out merely on the ground of availability of alternate remedy.

16. As the writ petition succeeds on the points enumerated above there exists no necessity for the Court to have dealt with other grounds which have been taken by the petitioner in this writ petition.

17. In view of what has been indicated above, the Writ petition succeeds. A writ in the nature of certiorari quashing the impugned order of removal dated 269 1988 contained in Armexure15 to the writ petition passed by the opposite party No. 3 is issued. A writ in the nature of mandamus is also issued commanding the opposite parties to reinstate the petitioner and to treat him in service and the to pay his full salary and allowances on the post in question. In the circumstances of the case there is no order as to costs.