

(2013) 01 DEL CK 0153
In the Delhi High Court
Case No : LPA No. 723 of 2012

Air Force Senior Secondary School and Another	APPELLANT
Vs	
Pushpa Sah and Others	RESPONDENT

Date of Decision : 22-01-2013

Acts Referred:

Citation : (2013) LabIC 989 : (2013) LLR 537

Hon'ble Judges : V.K. Jain, J;D. Murugesan, J

Bench : Division Bench

Advocate : K.K. Sharma, Adv with Ms. Bhanita Patowary, for the Appellant; J.P. Senth with Mr Sumeet Batra and Ms Ankita Gupta, Adv for R-1 and Mr Swastik Varma with Ms Sonam Anand, Adv for R-2 and 3, for the Respondent

Judgement

V.K. Jain, J.—The respondent No. 1, Pushpa Shah, who was working as librarian with the appellant school, was issued a charge sheet, alleging various acts of misconduct insubordination etc. After holding a Departmental Inquiry into the charges, penalty of dismissal of service was imposed upon her. She filed an appeal before the Delhi School Tribunal (hereinafter referred to as "the Tribunal") challenging the order of dismissal. Vide order dated 17th December, 2002, the Tribunal quashed the penalty imposed upon respondent No. 1 and remanded the matter back with directions to constitute a fresh Disciplinary Authority Committee (hereinafter referred to as "DAC"), with the approval of respondent No. 3 Director of Education. In compliance of the order passed by the Tribunal a DAC was constituted. In its meeting held on 11th July 2003, the DAC resolved to issue a Show Cause Notice, based upon the earlier charge sheet issued to respondent No. 1, and hold an inquiry into those charges. The copy of the charge sheet was forwarded to respondent No. 1 vide letter dated 29th July, 2003. Vide letter dated 31.10.2003, she sought payment of subsistence allowance to enable her to engage a Defence Assistant to defend her in the inquiry. There were other correspondences also exchanged between the parties. On 27.11.2003, the appellant sent a cheque of Rs. 5000/- to respondent No. 1 towards payment of subsistence allowance. The respondent No. 1, however, did not join the inquiry

as a result of which she was proceeded ex parte in the inquiry on 12.12.2003. On submission of Inquiry Report, a Show Cause Notice was issued to respondent No. 1, asking her to show cause as to why major penalty of dismissal from service be not imposed on her. After considering the reply received from respondent No. 1, the appellant forwarded a proposal to Director of Education to impose penalty of dismissal of service upon respondent No. 1. Being aggrieved, respondent no. 1 filed WP(C) 3353/2005 in this Court in which an interim order was passed, directing Director of Education not to convey its approval/disapproval with respect to the imposition of penalty upon respondent No. 1. On 23.04.2005 the amount of subsistence allowance was paid to respondent No. 1. The decision of respondent No. 3 Director of Education on the proposal for dismissal of respondent from service, which had been kept in a sealed cover, was opened by the Court in which the WP(C) 3353/2005 was pending at that time. It was revealed on opening the sealed cover that the Director of Education had not agreed with the recommendations made by the appellant and had directed it to follow the procedure laid down in Rule 120 of Delhi School Education Rules, 1973. Thereupon the learned counsel for the appellant made a statement that further action by them shall be taken in terms of the order passed by the Director of Education. The writ petition was disposed of with a direction to respondent No. 1 to co-operate in the inquiry, if held against her in accordance with law. The meeting of the DAC was held on 17th December, 2008 and pursuant to the decision taken in the said meeting, a proposal for imposing major penalty of dismissal of respondent from service was sent to Director of Education, on 19th December, 2008, for its approval. Vide letter dated 24.12.2010, the Director of Education conveyed to the appellant that the penalty of dismissal of respondent No. 1 from service was not warranted, considering the omissions and commissions on her part and that the ends of justice would be met if major penalty of compulsory retirement was imposed upon her. Pursuant to the aforesaid communication from Director of Education, the appellant, vide order dated 14.03.2011, imposed major penalty of compulsory retirement upon respondent No. 1. The order was challenged by respondent No. 1 before the Tribunal. The appeal filed by her was allowed by the Tribunal. Being aggrieved vide order dated 31.08.2012, the appellant filed WP(C) 5943/2012 challenging the order passed by the Tribunal. The writ petition having been dismissed, the appellants are before us by this appeal.

2. The first contention of learned counsel for Respondent No. 1 before us was that there was denial of principles of natural justice to respondent no. 1 since she was not paid subsistence allowance as a result of which she could not defend herself during the inquiry. In support of his contention, the learned counsel for respondent No. 1 has placed reliance upon the decision of Supreme Court in Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and Another, . In the case before the Supreme Court, the appellant had contended that during the period of suspension he was not paid subsistence allowance as a result of which he could not undertake a journey from his home town in Kerala to place in Karnataka

where departmental proceedings were being held. Not only was the appellant denied any subsistence allowance, his prayer for adjournment on account of his illness, which was duly supported by medical certificates was refused, resulting in ex parte proceedings against him. The Apex Court held that the appellant had been punished in violation of principles of natural justice.

3. In *Fakirbhai Fulabhai Solanki Vs. Presiding Officer and Another*, , Supreme Court, inter alia, observed that an order of suspension by itself does not put an end to the employment and the workman continues to be an employee during the period of suspension, though it prevents him from rendering his services. It was further observed that most of the workmen are not in a position to maintain themselves and the members of their family, during the pendency of the proceedings before the Tribunal. It was noted that in addition to the cost of maintenance of the family, the workman has to find money to meet the expenses that he has to incur in connection with the proceedings before the Tribunal and if no amount is paid during the pendency of the application made by the management to the Tribunal, it has to be held that the workman concerned has been denied a reasonable opportunity to defend himself in the proceedings before the Tribunal and such denial leads to violation of principles of natural justice and consequentially vitiate the proceeding before the Tribunal under sub-section (3) of Section 33 of Industrial Disputes Act. The view taken by the Supreme Court in respect of payment to a workman during pendency of the proceedings before the Tribunal would equally apply to an employee who is facing a departmental inquiry and is denied the subsistence allowance and on account of non-payment of such allowance, he is not in a position to defend himself in the inquiry instituted against him.

In *State Government of M.P. and Others Vs. Shankarlal*, , Supreme Court observed that the payment of subsistence allowance, in accordance with the Rules, to an employee under suspension is not a bounty. It is a right.

4. In *Ghanshyam Das Shrivastava Vs. State of Madhya Pradesh*, , the appellant before Supreme Court was placed under suspension and subjected to a departmental inquiry. He did not participate in the inquiry which, therefore, was held ex parte and the charges were reported to be proved. The main contention of the appellant was that no subsistence allowance had been paid to him and, therefore, he had no money to go to the place where the inquiry was being held. That place was 500 kilometres away from the place where the appellant was residing during his suspension. The High Court did not accept his contention, noticing that he did not complain specifically in the writ petition that he could not attend the inquiry as he had not been paid subsistence allowance and had no means of his own to meet the expenses of going to the place of inquiry. It was further noted that in his affidavit, he had not given particulars of his source of income and the estimate of expenses to be incurred by him in the inquiry. It was also noted by the High Court that train fare from the place of the appellant to the place of inquiry was only about Rs. 20. Allowing the appeal, Supreme Court

noted that the appellant had sent a letter to the Inquiry Officer, informing that unless subsistence allowance was paid, he would not be able to face the inquiry. This, Supreme Court found to be a specific pleading on the point of non-payment of subsistence allowance and shortage of funds with the appellant. The Court felt that it would prima facie suggest that the appellant had no other source of income except his pay. It was also noted that the affidavit of the respondent did not allege that the appellant had any other source of income except his pay. Noticing that he was suspended on 13.10.1964 and did not get subsistence allowance till 20.03.1965, the Court felt that the order passed by the High Court was not sustainable.

5. In the case before us, this is not in dispute that the respondent was placed under suspension since some time in the year 1994. Vide letter dated 11.08.2003, a copy of which has been filed by the appellant, respondent No. 1 wrote to the appellant that for last 10 years, she had suffered hunger, torture and trauma and was empty stomach and sought release of her salary, which had been withheld for 10 years. This is appellant's own case that vide letter dated 31.10.2003, the respondent demanded subsistence allowance so as to enable her to engage a defence assistant for participation in the inquiry. Vide letter dated 18.11.2003, the appellant informed the respondent that the amount of arrears and the period for which the subsistence allowance would be paid, would be decided by Directorate of Education, but, the management was processing to give some reasonable amount to her on account basis. This letter was followed by a letter dated 27.11.2003, enclosing a cheque of Rs. 5,000/- towards subsistence allowance. The case of the respondent is that she had repeatedly been writing to the appellant to pay the subsistence allowance to her. In her letter dated 01.09.2004, in reply to the show-cause notice dated 22.07.2004, the respondent referred to those letters and stated that injustice had been done to her since she could not get subsistence allowance, as a result of which, she was not able to defend herself during the departmental inquiry as she had no money whatsoever to engage a defence assistant, who could present her case before the Inquiry Officer. In the concluding part of this communication, she again sought release of the subsistence allowance to her. In her writ petition, filed before this Court (CWP 3353/2005), the petitioner specifically referred to her letters dated 11.08.2003, 31.08.2003, 08.11.2003 and 13.11.2003, seeking payment of subsistence allowance and stated that since only Rs. 5,000/- were paid to her towards subsistence allowance on 27.11.2003, she was unable to defend herself before the Inquiry Officer. She also referred to her letter dated 31.10.2003 stating therein that she had no money to engage a suitable defence assistant and, therefore, was not in a position to attend the departmental inquiry. A copy of the letter dated 31.10.2003 is annexure P-7 to the writ petition. She also referred to her telegram dated 13.11.2003, wherein a request was made for release of the subsistence allowance so as to help her in engaging a suitable defence assistant and further stating that only then she would be in a position to attend the inquiry proceedings. The copy of the said telegram is annexure P-11

to the writ petition. Thus, this was the specific case of the respondent in the communications sent by her to the appellant during the course of inquiry that unless subsistence allowance was released to her, she would not be able to engage an appropriate defence assistant and would not be able to participate in the inquiry. There is no plausible explanation from the appellant for not paying the whole of the subsistence allowance to the respondent at the time it became due to her. A perusal of the non-employment certificate dated 25.06.2005, issued by the respondent, a copy of which has been filed by the appellant, would show that subsistence allowance for the period from January, 1997 to May, 2005 was paid to her on that date. Thus, no subsistence allowance at all was paid to the respondent for almost seven years and, thereafter, on persistent demand by her, only a paltry sum of Rs. 5000/- was paid to her. In our view, a paltry payment of Rs. 5000/- to the respondent on 27.11.2003 certainly would not have been sufficient for the respondent to not only take care of herself and her family, but also meet the expenses to be incurred in defending herself in the inquiry which, inter alia, included paying remuneration to the defence assistant whom she wanted to engage to defend her in the inquiry. An employee cannot be expected to maintain herself and her family members and also incur the expenditure to defend herself in a departmental inquiry even if the subsistence allowance, which is the minimum amount required to sustain the employee and her family members, is not paid to her on a regular basis.

6. The case of the respondent is that she did not have the means to pay to the defence assistant she wanted to engage and consequently, she could not engage him and could not defend herself before the Inquiry Officer. This is not the case of the appellant that the respondent possessed sufficient means to defend herself in the inquiry, even without payment of subsistence allowance to her. This was not the case of the appellant before us that the respondent had income from other sources or had savings which were sufficient to enable her to engage a defence assistant, without receiving the subsistence allowance from the appellant. Therefore, the prejudice to the respondent on account of withholding of subsistence allowance for an unreasonably long period is writ large in the case before us. We, therefore, have no hesitation in concluding that non-payment of subsistence allowance to the respondent violated the principles of natural justice since the respondent, on account of non-payment of subsistence allowance, was unable to engage a defence assistant and defend herself before the Inquiry Officer. For the reasons stated hereinabove, we find no reason to interfere with the order of the learned Single Judge to the extent he has upheld the order of the Tribunal setting aside the penalty order dated 14.03.2011. However, in our opinion, the cost of litigation awarded by the Tribunal to the respondent was highly unjustified. In our view, payment of Rs. 1 lakh towards cost of litigation would be sufficient in the facts and circumstances of the case. We are also of the considered view that the appellant should be granted liberty to resume the inquiry proceedings on the basis of chargesheet already served upon the respondent, after payment of the cost of litigation, awarded by us and up to date

subsistence allowance, as per rules. If the appellant decides to resume inquiry, the same shall be concluded within a period of three months of the inquiry being resumed. The appellant shall continue to pay subsistence allowance to the respondent as per the rules applicable to her. If the appellant decides to resume the inquiry in terms of this order, the respondent would fully cooperate with the Inquiry Officer.

The appeal stands disposed of. No other as to costs.