

(2013) 12 AHC CK 0032

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 57919 of 2011 and 45382 of 2013

Awadhesh Narain Mishra

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-12-2013

Acts Referred:

Model Conduct Discipline Rules, 1992 — Rule 5

Citation : (2014) 1 ADJ 410 : (2014) 1 UPLBEC 639

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : Vikrant Pandey, for the Appellant; Kant Shukla, for the Respondent

Judgement

1. We have heard Shri Vikrant Pandey, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondent Nos. 1 to 3. Shri Shrikant Shukla appears for U.P. State Food and Essential Commodities Corporation Ltd. respondent No. 4. The Writ Petition No. 57919 of 2011 has been filed challenging the recovery of Rs. 61,14,271/- as arrears of land revenue under Rule 236 of UPZA & LR Rules by the Tehsildar vide citation dated 19.9.2011 to recovery the amount after adjusting his retirement dues from the petitioner for the losses caused to the Corporation, on the failure of the petitioner of the supervision and control while serving as District Incharge of the godowns of the Corporation storing foodgrains in the year 2004-05.

2. An interim order was passed on 21.10.2011, staying the recovery provided the petitioner furnishes adequate security to the satisfaction of U.P. State Food and Essential Commodities Corporation Ltd. (the Corporation) through its Managing Director respondent No. 4 within 30 days.

3. The petitioner furnished a surety bond, which was not found acceptable on which the petitioner furnished security by mortgage of his property. The Managing Director of the Corporation by his order dated 26.7.2012 found that the mortgage deed is not on the proper form nor is registered. The mortgage

deed was also insufficient inasmuch as the valuation of the property offered as security is Rs. 35.58 lakhs, which did not cover the total demand of Rs. 61,14,271/-.

4. Aggrieved the petitioner has filed the second Writ Petition No. 45382 of 2013 challenging the order passed by the Managing Director of the Corporation finding that the security furnished is insufficient.

5. The parties have exchanged their affidavits. With the consent of parties we finally heard the writ petitions.

6. The petitioner was appointed as Assistant Commercial Inspector in the Corporation in the year 1976. In the relevant period of 2003-04 he was serving as District Manager of the Corporation at Allahabad. A special audit was carried out of the records of the godowns on which a charge-sheet dated 12.6.2008 was served on the petitioner. During the pendency of the enquiry the petitioner retired as District Incharge of the godowns on 31.10.2009. The imputation in all the 36 charges levelled against the petitioner related to the lack of supervision and control of the godowns of the Corporation, when the petitioner was posted as Godowns Incharge at Block Baharia, Tehsil Phoolpur, District Allahabad. It is submitted that the enquiry was not held in accordance with the provisions of the Model Conduct, Discipline and Appeal Rules of 1992 for Services of UP State Enterprises inasmuch as the petitioner was not provided the documents relied upon by the enquiry officer nor he was given adequate opportunity to defend himself. The copy of the enquiry report was not given to him and that the punishment order, is not appealable, as the petitioner is not in service. The petitioner was found responsible for the loss of Rs. 64,12,800.21 only on the ground of lack of supervision and control. The impugned order of punishment dated 22.6.2011 does not discuss the petitioner's defence nor records any finding on facts and charges of the manner of lack of supervision or the irregularities on which the shortfall in the godown was determined nor does it apportion the petitioner's liability for the shortages found in transfer of the stocks to other godowns.

7. It is submitted that there were charges of lack of administrative and financial control over the godowns. The charges of administrative irregularities are not sufficient to direct recovery of losses as the petitioner retired during the pendency of the enquiry, and in any case these charges were not such which could have entailed any recovery. So far as the charges of financial irregularities, namely charge Nos. 7, 14, 20, 23, and 36 are concerned, the losses are presumptive and based upon the finding of lack of supervision and control over the godowns. The Competent Authority assumed that on account of such lack of supervision there were shortages in the godowns for which the petitioner in conspiracy with others was held responsible to make good the losses. The details of losses, which were found in the special audit, the details of conspiracy and the conspirators and the apportionment of the liability in such conspiracy was not considered at all. The punishment order is arbitrary, cryptic, and vague. No one

can be punished to recover the losses on such findings, which are insufficient, inconclusive and are recorded without discussing petitioner's defence.

8. Shri Vikrant Pandey further submits that there were no provisions in the Rules of 1992 applicable to the employees of the Corporation for imposing major penalty of recovering the losses caused to the Corporation by way of arrears of land revenue. In fact the definition of misconduct did not include the loss caused to the Corporation under Rule 5 of the Model, Conduct Discipline Rules of 1992. On 31.8.2010 by a Gazette Notification the State Government amended the Rules of 1992 by adding sub-rule (24) to Rule 5, which provides that if any officer or employee of the Corporation is found to have embezzled, misutilised or misappropriated the foodgrains or the property of the Corporation, such conduct will fall within the meaning of misconduct. Rule 33 was also amended by the same amendment providing for major punishment and in which a new sub-rule (Ja) was added providing for recovery of the amount for which the employee has been found guilty of misconduct as defined under Rule 5(24), to be made as arrears of land revenue under U.P. Public Money (Recovery of Dues) Act, 1972 by Notification dated 31.10.2010, much after the petitioner had retired and the special audit report was received.

9. In the present case, the defaults, if any, were committed in the year 2004-05. The charge-sheet was prepared on 12.6.2008. The petitioner retired on attaining the age of superannuation on 31.10.2009. The order of punishment was passed on 22.6.2011. At the time of alleged misconduct and issuance of charge-sheet the rules were not amended and thus no enquiry could be held nor any punishment could be given or recovery made as punishment for the alleged conduct treating it as misconduct prior to the amendments of the Rules by Notification dated 31.10.2010, much after the petitioner had retired and the special audit report was received.

10. Shri Vikrant Pandey also submits that the entire enquiry proceedings were vitiated inasmuch as the enquiry report was not served upon the petitioner. He submits that in para-10 of the writ petition the petitioner has made a categorical statement that the enquiry report was not served upon him. In para-29 of the counter-affidavit there is a general denial; there is no positive reply that the enquiry report was served nor any date of service of enquiry report is given.

11. Shri Shrikant Shukla, appearing for the Corporation submits that the petitioner had filed a Writ Petition No. 53682 of 2011, which was dismissed by learned Single Judge on 12.10.2011 on the ground of alternative remedy of appeal under Rule 42 of the Rules of 1992, which have been adopted by the respondent Corporation. An objection was taken that after termination of services of the petitioner appeal would not be maintainable. Learned Single Judge held that this ground can be raised in appeal. The writ petition was accordingly disposed of. The petitioner filed a Special Appeal No. 2061 of 2011 in which an argument was taken that initially learned Single Judge had observed orally to call for counter-affidavit but thereafter without deciding the issue as to

whether the appeal would be maintainable, the writ petition was dismissed on the ground of alternative remedy of filing an appeal. The Division Bench hearing the Special Appeal by its order dated 4.11.2011 did not find any error in the judgment. It, however, found that the ground that learned Single Judge was not going to dismiss the writ petition, and had called for a counter-affidavit could only be taken by way of review petition before learned Single Judge. The petitioner was given liberty to file a review petition to that effect.

12. It is submitted that the petitioner filed a review petition, which was rejected by learned Single Judge, against which the petitioner has filed a Special Appeal Defective No. 402 of 2013, which is still pending. He submits that in view of the aforesaid, the order of punishment has become final which includes the recovery of the amount and which is sought to be recovered by a procedure provided in the Rules, which is retrospective in nature. The procedure and the method of recovering the amount does not give any substantive right to the petitioner on the basis of which he may challenge the recovery proceeding.

13. Shri Shrikant Shukla further submits that in pursuance to a Public Interest Litigation filed in Lucknow Bench of this Court an enquiry was made with regard to serious irregularities in shortage and distribution of foodgrains in which an investigation was conducted by the Special Investigation Team of the State Government and in which these godowns were also involved. Large scale irregularities have been found in the investigation. Large quantities of foodgrains were found to be transported through trucks, whereas the registration number of the vehicles were found to be of scooters and motorcycles. He submits that the Court should not interfere and relegate the petitioner to file an appeal, and that since the petitioner has not submitted adequate security in compliance with the orders passed in Writ Petition No. 57919 of 2011, the writ petitions be dismissed.

14. We have considered the arguments and find that the departmental enquiry was conducted in gross violation of principles of natural justice, which are incorporated in the Model Conduct Discipline & Appeal, Rules 1992, applicable to the Corporation. Though the charge-sheet was submitted prior to the retirement of the petitioner, and the enquiry could have continued, the charges of lack of administrative and financial supervision would have required a detailed enquiry in which the petitioner was required to participate. Out of 36 charges, only charge Nos. 7, 14, 20, 23 and 36 related to financial irregularities on which the findings are cryptic and vague. The disciplinary authority has merely reiterated the charge and the finding of enquiry officer, without discussing the enquiry report and the reply given by the petitioner to the charge.

15. We have looked into each of the charges and find that in none of the charges the petitioner was held responsible for misappropriation misutilisation or embezzlement of the foodgrains or the property of the Corporation. The allegations in the charges were with regard to lack of supervision and control and in failing to carry out regular inspections. There was no immediate report of any shortage in the godowns. In the special audit report of the year 2004-05, dated

9.1.2006 it was found that there were some discrepancies in the stock in the godowns which related to the period when the petitioner was posted as Incharge of the godowns. In the punishment order these shortfalls have not been directly attributed to the petitioner. The imputation in the charges is of lack of administrative and financial control. The entire punishment order is vague, sketchy and does not fix responsibility of any losses on any person including the petitioner, nor does it apportion the liability. The losses are presumptive in nature and the responsibility is deemed to be fixed on those who were in administrative control of the godowns.

16. Out of the five charges of financial irregularities, only charge No. 14 appears to be of serious in nature in which the financial loss of Rs. 49,20,276.67 is attributed to the petitioner. A perusal of the allegations in charge No. 14 would show that the petitioner was held responsible for lack of supervision over the godowns on account of which the loss was caused, which was detected in the special audit. It is stated that when the petitioner was posted as District Incharge of the godowns of the block Baharia, the shortage of the amount deposited of Rs. 3,34,052.75; stock shortages of Rs. 41,47,120.94, loss of Rs. 26,500/- towards unauthorised transfer of foodgrains, transportation losses of Rs. 3,87,257.98, totalling Rs. 49,20,276.67 was reported and which is attributed to the petitioner. The allegations are that the petitioner did not take any steps to check these losses, from which it is presumed that he had knowledge of these shortages and thus he had caused loss to the Corporation in a planned manner.

17. In the punishment order dated 22.6.2011, the findings in respect of charge No. 14 is that this charge relates to financial irregularities in which the loss of Rs. 49,20,276.67 was caused to the Corporation, which was found to be established in the enquiry report. The allegations and finding recorded by the enquiry officer, the nature of the lack of supervision and control and the conspiracy have neither been found to be proved nor is there any reference of the proof of these allegations in the punishment order.

18. Further we find that the finding of misconduct has been recorded without giving any details of facts. The recording of satisfaction or agreement with the report of the enquiry officer would not by itself be sufficient to establish the charges of financial irregularities and for recovering the said amount from the delinquent officer. The satisfaction of the disciplinary authority should be clearly recorded after discussing the findings of the enquiry officer, in the light of the defence offered by the charge-sheeted employee.

19. We also find that though the amendment in the procedure for recovery under Rule 33 for major penalties under Rule 33(Ja) may be treated to be retrospective in nature, but that the addition of the clause (24) in Rule-5 defining misconduct is of substantive nature on which the petitioner could not have been charged and on which the enquiry could not have been initiated prior to the amendment of the Rules notified on 31.8.2010 by the State Government. The embezzlement, misappropriation or misutilisation of the foodgrains or property of the

Corporation was not included within the meaning of "misconduct", in the unamended Rule-5. The inclusion of clause (24) is on the allegations, which would amount to misconduct substantively and since the embezzlement, misappropriation and misutilisation were not included in the definition of misconduct, the respondent Corporation could not have initiated disciplinary proceeding against the petitioner and to hold the petitioner guilty of such misconduct for the same reasons. The losses caused to the Corporation, which would not amount to a substantive misconduct, could not be enquired into by the department nor its recovery could be ordered as arrears of land revenue on the assumption of such misconduct.

20. The order of punishment is not under challenge before us and thus we are not setting aside the order of misconduct. The recovery in pursuance to the order of punishment has been challenged, and for which on the discussion made above we are of the view that the recovery of the amount for which there is no specific finding of embezzlement, misappropriation or misutilisation by the petitioner cannot be made from the petitioner. The respondent authorities do not have powers to enquire into such charges, which also required greater degree of proof than mere charge and a vague finding.

21. The Writ Petition No. 57919 of 2011 is allowed. The citation for recovery dated 19.9.2011 issued by respondent No. 3 is set aside. The respondents are directed not to recover the amount in pursuance to order of punishment dated 22.6.2011.

22. In view of the relief granted by us in Writ Petition No. 57919 of 2011, the prayers made in Writ Petition No. 45382 of 2013 on the sufficiency of security have become infructuous. The writ petition is dismissed as infructuous. Since we have held that no recovery can be made from the petitioner as arrears of land revenue on the charges, and findings recorded by the disciplinary authority, any amount deducted from the retiral benefits of the petitioner shall be paid over to him within three months.