

(2000) 05 AHC CK 0062
In the Allahabad High Court
Case No : C.M.W.P. No. 15270 of 1995

Bajrang Prasad Srivastava

APPELLANT

Vs

U.P. Pariyojana Prabandhak and others

RESPONDENT

Date of Decision : 04-05-2000

Acts Referred:

Constitution of India, 1950 — Article 21, 309

Citation : (2000) 3 AWC 1960 : (2000) AWC 1960 : (2000) 2 UPLBEC 1321

Hon'ble Judges : V.M. Sahai, J

Bench : Single Bench

Advocate : Umesh Chandra Mishra, for the Appellant; N.C. Rajvanshi, for the Respondent

Judgement

V.M. Sahai, J.—The petitioner was appointed as Lab Assistant in 1975 in U. P. State Bridge Corporation, Lucknow (in brief corporation). He was confirmed in 1989. He was elected as Vice-President of the Uttar Pradesh Rajya Setu Nigam Sanyukt Karamchari Sangh. Shakha. Etawah on 2.11.1993. He was posted on 28.12.1993 at Ahnaiya Setu Moonj Rampura, Etawah. On 7.4.1994 he got information that a dacity had taken place in the night of 6.4.1994 on the workers who were working at Kursaua Tamairi Road where construction work of Sirsa River Bridge was going on. He being Vice-President of the Union, rushed to the place of incident. After some time Deputy Project Manager Shri Hemant Kumar Chauhan/respondent No. 2 (in brief Shri Chauhan) also reached there. The petitioner apprised him of the incident and requested to lodge a report with the police. But Shri Chauhan did not agree. On the contrary, he became annoyed and enquired from the petitioner as to why he had reached there. According to the petitioner, Shri Chauhan even misbehaved with the petitioner, therefore, he was compelled to write against him on 8.4.1984 to respondent No. 1 with copy to District Magistrate, Chief Development Officer and the Managing Director of the Corporation. The Chief Development Officer forwarded the letter of the petitioner to the Managing Director on 22.4.1994. On 17.1.1995 the General Manager wrote a letter to the petitioner to furnish evidence in support of his complaint

dated 8.4.1994.

2. In the meantime, the petitioner was suspended by Shri Chauhan on 11.4.1994. He was attached to the place of his posting. The suspension order further directed the petitioner not to enter any other place of construction in Etawah Unit. On 5.5.1994 Shri Chauhan framed four charges against petitioner. The first charge was that the petitioner without prior permission reached Tamairi site and instigated the workers to stop the work. The second charge was that on 7.4.1994 and 8.4.1994 the petitioner, Shri Anuj Kumar Jha electrician, Shri Khaliq Khan Khalosi and Munna Singh truck driver conspired to get the work stopped and instigated the workers who were willing to work to stop it. The third charge was that the petitioner on a private jeep went around all the places of the unit where work was going on and instigated the workers to stop the work. It was alleged that the petitioner further came to the office of the Deputy Project Manager on 11.4.1994 misled the workers and instigated them to stop the work. The fourth charge was that due to instigation of petitioner the workers of the entire places came to Etawah but when they came to know that they were misled then they returned. The result was that the work in all the places on 11.4.1994 remained closed. Even the work in the constituency of the Minister was obstructed which affected the image of the corporation and caused loss to it. In the bottom of the charge-sheet, it was mentioned that the violations of various clauses of standing orders against petitioner was proved. But the charge-sheet did not mention any material or evidence on which it was based or which was to be produced against the petitioner.

3. On 29.9.1994 the petitioner received a letter from Shri Ramjee Singh, Assistant Engineer that he had been appointed enquiry officer by the Deputy Project Manager and he may appear before him on 10.10.1994. In compliance to this letter the petitioner appeared and his statement was recorded. He was questioned about the charges even though no charge-sheet was served on him. The petitioner wrote a letter on 19/20.10.1994 to the enquiry officer to supply a copy of the charge-sheet as It has not been served on him. He further requested that a copy of his statement recorded on 10.10.1994 and certified copy of other documents may be supplied to him. The enquiry officer supplied a copy of the charge-sheet only. No other document was supplied. Even copy of his statement was not supplied. The enquiry officer did not fix any date thereafter nor did he bring on record any evidence in support of any of the charges framed against the petitioner. And if any material was brought on record the petitioner was not informed of it nor he was confronted. The enquiry officer did not supply copy of any document on which he proposed to rely. In the bottom of the statement of the petitioner there is an endorsement that the petitioner filed three documents. But there is no mention that any document was filed by the corporation. The enquiry officer did not fix any date for holding the enquiry except 10.10.1994 the date on which the statement of petitioner was recorded. He submitted the report, thereafter, without affording any opportunity to petitioner to defend. The copy of the statement and report have been filed as Annexures-CA2 and CA-5 to the

counter-affidavit. The respondents have filed two letters as Annexures-CA-3 and CA-4 to the counter-affidavit. One is dated 10.4.1994 by Shri Lalta Prasad that the petitioner was absent on 7.4.1994 without his permission and another report dated 17.5.1994 that the petitioner was not present at his residence on 11, 13 and 17th May, 1994. None of the officers were examined in support of these reports. The papers were not supplied to the petitioner even though he made a request for supplying the documents. The enquiry officer found that all the charges against the petitioner were proved. On the report of the enquiry officer, the petitioner has been dismissed from service by order dated 8.4.1995 passed by Shri Chauhan. The order has been filed as Annexure-20 to the writ petition. It is this order dated 8.4.1995 which is under challenge in the instant writ petition.

4. I have heard Shri Umesh Chandra Mishra learned counsel for the petitioner and Shri N.C. Rajvanshi learned senior counsel for the respondents, Shri Rajvanshi has also produced the records. Learned counsel for the petitioner urged that the dismissal order passed by respondent No. 2 was arbitrary, biased, mala fide and contrary to principles of natural Justice. He urged that during 11.4.1994 to 8.4.1995, the petitioner was not paid any subsistence allowance which was violative of right to life guaranteed under Article 21 of the Constitution and the petitioner is entitled for compensation as his constitutional right was violated by Shri H.K. Chauhan intentionally, knowingly and deliberately. The learned counsel for petitioner urged that on identical charge, three other employees were charge-sheeted but they were awarded minor punishments whereas major penalty of dismissal from service has been awarded to him. On the other hand Shri Rajvanshi urged that the respondent being the appointing authority could have passed the dismissal order and there was no violation of the principles of natural justice as the enquiry was held, by another officer, in accordance with standing order. He submitted that the subsistence allowance could not be paid to the petitioner as he was found absent from the place where he was attached after suspension. The learned counsel submitted that the non-payment of subsistence allowance and dismissal order passed by respondent No. 2 was in discharge of his official duty and there was no violation of Article 21 nor the respondent No. 2 was publicly accountable and no compensation could be awarded, against him.

5. Admittedly the petitioner was not paid any subsistence allowance from 11.4.1994 to 8.4.1995, that is, the day he was suspended till he was dismissed. The explanation given for it is that the petitioner was absent from Ahnaiya Setu. Moonj Rampura. Etawah, where he was attached during suspension. In support of this assertion reliance has been placed on letters of Assistant Engineer dated 10.4.1994 and 17.5.1994 Annexures-CA-3 and CA-4 to the counter-affidavit. In Annexure-CA-3 it has been stated that the petitioner was absent without any permission from the work place from 7.4.1994 to 9.4.1994. This letter has no relevance for stopping subsistence allowance of the petitioner as he was suspended on 11.4.1994. So far as Annexure-CA-4 is concerned, it is a report submitted to Shri Chauhan by one Shri Naresh Singh helper that he took the

confidential letter on 5.5.1994 at the residence of the petitioner but he refused to accept it. It mentions that he went on 11, 13 and 17th May, 1994, as well. But there is no mention that the letter was taken at the site. The letter bears an endorsement that it was returned to respondent No. 2 for necessary action- After the recital that the original is being returned there is an endorsement that from 11.5.1994 the petitioner was not coming at work place. A bare look of the letter indicates that it was later addition, to make out a case of absence of petitioner. In reply to question by the enquiry officer whether petitioner was absent from 11.5.1994 to 13.5.1994, he stated that application for leave was given at Site in the presence of Shri S. N. Singh, in reply to questions 7 and 8 the petitioner replied that the assistant engineer/had assured him that he will send the reply and that he gave him leave. Apart from Annexure-CA-4 no material has been filed with the counter-affidavit to show that the petitioner was absent. The Deputy Project Manager in counter-affidavit filed stated in paragraph 12 of the counter-affidavit that the petitioner after being suspended did not report at the place where he was attached.

6. The question, therefore, that arises for consideration is whether Shri Chauhan was justified in the circumstances in withholding the subsistence allowance of petitioner. In any case even assuming that petitioner was absent for few days, even though according to him he had gone to Etawah for treatment of his son after applying for leave, the question is could this furnish basis for withholding subsistence allowance. Counter-affidavit was sworn on 3.8.1995. No material has been brought on record to establish that the petitioner was absent after 17.5.1994. Section 4 of the standing order provides as under :

"Section 4. The suspended workman shall not during the period of suspension enter the factory premises and any other portion of the premises mentioned in the order nor shall leave the station except with the permission of the management and shall report daily to the security officer or any of the officer so authorised by the management of the corporation at the gate at the specified time."

7. The consequence of suspension thus is three fold; one, the employee cannot enter the factory or any premises or any place mentioned in the order; two, he cannot go out of station except with the permission of the management; and third, he is required to report daily to the person authorised or nominated in the order. Since the petitioner was Lab assistant and was working in a project, the factory premises had to be understood as the place of working. The petitioner, therefore, could not go to the site. By suspension order, the petitioner was debarred from going to any site in Etawah where work was in progress except his place of posting. But this was not a direction to report for duty or be present at the site every day, The Deputy Project Manager did not nominate any officer or authority in accordance with Section 4 whom the petitioner was required to report daily.

8. When an employee, on suspension, is attached to an office, the purpose is

that he can draw his subsistence allowance from that office and can apply for leave if he has to go out of station. He is not required to go to the office dally. I have already explained that under the Rules of the corporation, the petitioner was required to report daily to the officer nominated for the purpose. But since no officer or authority was nominated the petitioner did not commit any breach of the order. And when he was to leave station he applied for leave as is clear from the statement made before the enquiry officer for three or four days to take his son to Etawah for treatment. The allegation of the petitioner that he was granted leave or he applied for leave has not been investigated by the enquiry officer. The petitioner stated before, the enquiry officer that he was called to the office on 17.5.1994 for collecting his subsistence allowance. It was not paid to him. In the statement, the petitioner stated that the assistant engineer asked him to accept a sealed envelop received from Deputy Project Manager. When the petitioner wanted to know its contents, he was told that the subsistence allowance could be paid to him only if he accepted the envelop. He stated that he required a days" time. Thereafter he was not paid his subsistence allowance and it was deposited in the treasury as unpaid on 21.5.1994. There is no allegation or finding by the enquiry officer nor it is stated in the counter-affidavit filed by the Deputy Project Manager that petitioner was absent after 17.5.1994. The Deputy Project Manager in paragraph 13 of the counter-affidavit has stated that the petitioner was not entitled to any subsistence allowance since the concerned Assistant Engineer certified that the petitioner did not report at the site. The entire stand in the counter-affidavit for nonpayment of subsistence allowance being contrary to law and the standing order cannot be accepted. Although there is no material to show that petitioner was absent but even if it is assumed to be correct, it could utmost entitle the respondents to take action against petitioner but they could not withhold his subsistence allowance. The law on the effect of non-payment of subsistence allowance during suspension for not working or reporting for work has been settled by series of decisions rendered by the Apex Court and different High Courts. In Ramesh Chandra Chug v. Haryana State Electricity Board. 1986 13 SLR 1 , a Division Bench of Punjab and Haryana High Court relying on two decisions of the Apex Court in Khem Chand v. Union of India and others Khem Chand Vs. Union of India (UOI), and V.P. Gindroniya u. State of Madhya Pradesh and another AIR 1970 SC 1495 , held that the suspended employee cannot be asked to perform any official duty or to appear in and attend any office dally. The direction of the employer that the employee shall be granted subsistence allowance only if he reported for duty daily was held to be arbitrary and without Jurisdiction. The Bench drew support from Chittaranjan Ghosh v. I.G. of Police, W. B. and others 1979 (2) SLR 194 and Gangauathi, S.S. v. Chairman and M.D. Karnataka Land Army and others 1984 (3) SLR 493.

9. In Zonal Manager. Food Corporation of India and others v. Khaleel Ahmad Siddiqui 1982 (2) SLR 779, a Division Bench of Andhra Pradesh High Court held at page 781 :

"We fall to understand how when an employee is debarred temporarily from

service, he could be compelled to attend office and mark his attendance dally and also be visited with penalty if he does not mark his attendance."

10. The Apex Court in, O.P. Gupta Vs. Union of India (UOI) and Others, , has held that a suspended employee though he continues to be employee of the Government is not required to work. Suspension is resorted to for the reason that some enquiry is pending or is in contemplation against the employee. The non-payment of subsistence allowance is violative of Article 21 of the Constitution. Subsistence allowance is paid so that the employee who is being paid salary at a lesser amount may survive during the suspension period and he or his family may not starve. The effect of non-payment of subsistence allowance amounts to unwarranted harassment of the employee and penalising his family even before the guilt is established. It amounts to depriving the employee of right to life guaranteed under Article 21 of the Constitution. The Apex Court in Capt. M. Paid Anthony v. Bharat Gold Mines Ltd. and another. 1999 (82) FLR 627, has held that non-payment of subsistence allowance is an inhuman act which has an unpropitious effect on the life of an employee and its non-payment can be likened to slow poisoning. The observation of the Apex Court is extracted below :

"On joining Government service, a person does not mortgage or barter away his basic rights as a human being, including his fundamental rights, in favour of the Government. The Government, only because it has the power to appoint does not become the master of the body and soul of the employee. The Government by providing the job opportunities to its citizens only fulfils its obligations under the Constitution, including the directive principles of the State Policy. The employee, on taking up an employment only agrees to subject himself to the regulatory measures concerning his service. His association with the Government or any other employer, like instrumentalities of the Government or Statutory or Autonomous Corporations etc., is regulated by the terms of contract of service or Service Rules made by Central or State Government under the Proviso to Article 309 of the Constitution or other Statutory Rules including certified standing orders. The fundamental rights, including the right to Life under Article 21 of the Constitution or the basic human rights are not surrendered by the employee. The provision of subsistence allowance made in the Service Rules only ensures non-violation of the right to life of the employee....."

11. It is clear that the respondents without any basis and against the standing order deprived the petitioner of subsistence allowance, which was infringement of right to life guaranteed under Article 21 of the Constitution. Non-payment of subsistence allowance has even been held to be violative of principles of natural Justice vitiating the enquiry.

12. I now propose to examine the impugned order dismissing the petitioner from service. But before dealing with it, I may point out that the order is contrary to well-settled principle of natural justice that no one should be judged of his own cause. From facts mentioned earlier, it is clear that there was difference of opinion between the petitioner and Shri Chauhan and his misbehaviour

compelled the petitioner to make complaint to higher authorities. Shri Chauhan threatened him with dire consequences and he not only suspended him but framed the charges against him mentioning therein that the violation of standing orders was proved. In other words, the petitioner was found guilty even before the enquiry officer was appointed. The entire proceedings were monitored by Shri Chauhan. In the enquiry report, reliance has been placed on a letter sent by Shri Chauhan on 10.4.1994 to the District Magistrate against the petitioner. The petitioner in his complaint made to higher authorities had claimed that the enquiry be got made by some senior officer. Yet Shri Chauhan who was Deputy Project Manager not only filed complaint against the petitioner, threatened him with action, suspended him, framed charges, wrote letter against him and ultimately passed order of dismissal. The question is whether it was in accordance with principles of natural Justice. The principles of natural Justice is a concept which is ever expanding. But the two well established principles are (i) "Nemo debet esse judex in propria causa" that no one shall be a judge in his own cause, and (ii) "Audi alteram partem" that no one shall be condemned unheard. The law on "Nemo debet esse judex in propria causa" has been elaborately discussed by the Apex Court in Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, . The Court held that every possibility of a bias by the disciplinary authority must be nonexistent. The Court explained the principle of bias and its effect on proceedings thus :

"For appreciating a case of personal bias or bias to the subject-matter, the test is whether there was a real likelihood of a bias even though such bias has not in fact taken place. De Smith in his Judicial Review of Administrative Action, (1980) at page 262 has observed that a real likelihood of bias means at least substantial possibility of bias. In R. v. Sunderland Justices (1901) 2 KB 357 , it has been held that the Court will have to judge the matter as a reasonable man would Judge of any matter in the conduct of his own business. In R. v. Sussex Justices (1924) 1 KB 256 , it has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done. In Halsbury Laws of England. (4th Edn.) Vol. 2, para 551, it has been indicated that the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. The same principle has also been accepted by this Court in Manak Lal Vs. Dr. Prem Chand, . This Court has laid down that the test is not whether in fact, a bias has affected the Judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is often said that justice must not only be done but must also appear to be done."

If the conduct and behaviour of Shri Chauhan is examined in the light of these well-settled principles it is obvious that he was biased against the petitioner. The mere fact that Shri Chauhan entrusted the enquiry to an assistant engineer did

not eliminate the personal bias, which he entertained against the petitioner. As held by Apex Court, it is not the actual bias but a likelihood of bias, which vitiates the proceedings. The petitioner in the circumstances has a reasonable apprehension that Shri Chauhan was biased against him. Shri Chauhan became a judge of his own cause and dismissed the petitioner from service. His action was contrary to principles of fairness and justice.

13. The order of dismissal is bad and illegal, as the entire enquiry proceedings were contrary to standing orders and against the elementary principle that an employee should be given fair and reasonable opportunity to defend himself. The service condition of the employees is governed by standing orders for workmen employed by U. P. State Bridge Corporation Ltd. The petitioner was D-I employee i.e., a regular workman engaged on the regular establishment whose services had been confirmed. Paragraph "P" deals with act of misconduct on the part of workman. P1 deals with minor misconduct and P2 with major misconduct. The petitioner was charge-sheeted for major misconduct. Paragraph T of the standing orders gives out the procedure to be followed in cases of misconduct. It is in two parts. The first part, that is T1 to T4, provides that before imposing penalty, the workman shall be given an opportunity to explain the misconduct and if the competent authority is satisfied that the employee was to be warned or censored or fined only, then he would pass the order without formal enquiry. Even where formal enquiry is required T-3 and T-4 require specific charges to be served on employee giving him not less than 48 hours to submit his written explanation. T-3 explains that if the show cause notice cannot be served for any reason whatsoever on the employee, it should be pasted on the notice board of the corporation, which would mean that notice was served. The expression for any reason whatsoever is very wide to include non-service of the charge-sheet including refusal. Since the charge-sheet was not served on petitioner and there is no material on the record nor any averment in the counter-affidavit that it was pasted on the notice board of the corporation the punishing/competent authority could not have proceeded under paragraph T-4 and appointed the enquiry officer. T-4 is very important. It is again in two parts. The first deals with unqualified admission of the charge. It obviates any enquiry and empowers the competent authority to impose suitable punishment. But where the employee controverts the charges the punishing authority is required to scrutinise the explanation carefully and to drop the proceedings if he is satisfied with explanation. But if the explanation is not found satisfactory, then the enquiry is necessary. For that, the first step is to pass an order for holding enquiry and also appoint the enquiry officer. It further requires that the name of enquiry officer should be intimated to the workman. The punishing authority never obtained any explanation of the petitioner nor intimated the petitioner that he had appointed an enquiry officer. The first part of the standing order without compliance of which enquiry could not have been started nor enquiry officer appointed thus was not complied.

14. Paragraphs T-5 to T-18 deal with the second part that is manner in which enquiry shall be held and the order imposing penalty shall be passed. Various

sub-paragraphs require the enquiry officer to follow the procedure which are well known principles of natural Justice. It is to issue notice, give fair-and reasonable opportunity of hearing, read the charges, obtain explanation then examine witnesses of management to be followed by examination of employee witnesses etc. and thereafter make recommendation on material on record. The record reveals that neither the punishing authority nor the competent authority cared to follow either the first part of the procedure provided by sub-paragraphs T-1 to T-4 nor the enquiry officer discharged his duty of affording reasonable opportunity of hearing to the petitioner nor he followed the procedure provided in the sub-paragraphs T-5 to T-16. For instance, as stated earlier when the charges could not be served on petitioner no steps were taken to paste it on the notice board of the corporation or at the site to raise presumption that charges had been served. There is no averment in the counter-affidavit filed by Shri Chauhan that he asked for petitioner's explanation and found it to be unsatisfactory, therefore, he appointed an enquiry officer. Even the enquiry officer acted in gross breach of the provisions of standing order. The proceedings conducted by him and his report indicate that he did not have even elementary knowledge of the rules of holding disciplinary enquiry. He did not care to look into the standing orders otherwise he would not have acted in such callous disregard of principles of natural Justice . The enquiry officer, who was appointed in June, 1994, sent a letter to the petitioner that he may be present with all his papers on 10.10.1994 as the enquiry may be held against him. When the petitioner appeared, he was not required to admit or deny the charges framed against him. The enquiry officer instead proceeded to record the statement of the petitioner and concluded the enquiry. He must have been aware that the charge-sheet was not served on petitioner yet the enquiry officer did not serve a copy on the petitioner, before recording the statement. It is not mentioned either in the statement recorded of the petitioner or in the enquiry report that a copy of the charge-sheet was shown to petitioner at any point of time including recording of statement. Yet Shri Chauhan had the courage to say in the counter-affidavit that the charge-sheet was shown to the petitioner. It is admitted in the counter-affidavit that even copy of the statement recorded was not supplied. It has been filed in this Court. There is no material to show that any document such as letter sent by Shri Chauhan to the District Magistrate on 10.4.1994 complaining against petitioner or the report of assistant engineer etc. on which reliance has been placed in the enquiry report was shown or supplied to the petitioner. In the counter-affidavit Shri Chauhan has stated that all the documents were shown to petitioner and he was allowed inspection. Since the counter-affidavit was sworn by a senior officer. I sent for the records and was surprised to find that the averments are totally incorrect. It supports the contention of learned counsel for the petitioner that the action was in violation of principles of natural Justice. In paragraph 17 of the counter-affidavit it is stated that the charge-sheet was given much before departmental enquiry on 5.5.1994. 11.5.1994 and 13.5.1994. Both statements are incorrect. The charge-sheet was not given to petitioner on any of these dates. Shri Naresh Singh helper, went to serve the charge-sheet at petitioner's house on 5.5.1994

but according to him petitioner was not there. He could not serve it on 11.5.1994 and 13.5.1994 as well. The enquiry officer was appointed in June. 1994. Therefore, there could have been no occasion for departmental enquiry in May, 1994 as mentioned in the counter-affidavit. It may be that it was a mistake as explained by Shri N.C. Rajvanshi. In paragraph 19 of the counter-affidavit Shri Chauhan stated that the material relied by the enquiry officer was shown to the petitioner during course of enquiry. From the record it is clear, as claimed by the petitioner, that he was called by the enquiry officer to appear on 10.10.1994 and his statement was recorded. The enquiry officer fixed no other date. There is nothing on the record of the enquiry proceedings to show that the documents which were relied by the enquiry officer were brought on record or it was shown to petitioner. Shri Rajvanshi could not support the allegations that the enquiry was held and papers were shown to petitioner from record. The averment in paragraph 17 of the counter-affidavit that the petitioner was shown the charge-sheet on the date of enquiry is not borne out from the record. A senior officer like Shri Chauhan, in my opinion, understands the distinction between showing the charge-sheet and asking the petitioner to explain the charges framed against him by confronting him and asking him to explain that he was charged with the allegations that was read against him. The allegation in the counter-affidavit could not be substantiated. It lends support to petitioner's counsel's claim that Shri Chauhan was biased not only during proceedings but he has not been very fair to this Court. When the petitioner appeared, the enquiry officer recorded his statement on each charge, accepted three documents from him and recorded that if necessary, he shall be informed later. Thereafter, no date was fixed nor any enquiry was held and the enquiry officer made the recommendation that the charges against the petitioner were proved. He even held that the petitioner attempted to mislead the enquiry officer. I propose to deal with his findings but before that I may mention that the procedure adopted by the enquiry officer was novel. In any enquiry the employee is confronted with the allegations made against him. If he admits the charges no further step is needed. But if he denies then the enquiry officer has to fix a date, examine employer's evidence, afford opportunity to employee to cross-examine and then produce his witness if any. The statement of employee can be recorded once for admission or denial of the charges and then in the end after the evidence of employer is over. The enquiry officer without having regard to the procedure provided in the standing orders or the principles of natural justice recorded the statement of petitioner, without even supplying a copy of the charge-sheet and concluded the enquiry, without examination of any oral evidence in support of the charges as each one of them were factual and required to be proved. The entire procedure adopted in the enquiry was illegal, arbitrary, against the standing orders and in violation of principles of natural justice. This is sufficient to demonstrate that the entire enquiry proceedings were illegal and the order of punishing authority based on it cannot be upheld. But since the learned counsel for the corporation vehemently argued that the finding of guilt against petitioner having been recorded in the enquiry report, it does not call for any interference, it has become necessary to

examine if the argument has any substance. I now propose to examine the findings not with a view to reappraise the material on record but to determine whether the findings recorded by the enquiry officer are legal and can be sustained in law.

15. I have already mentioned that Shri Chauhan who was a senior officer complained against petitioner and pre-judged the issue by mentioning in the charge-sheet that violations of different paragraphs of standing order by the petitioner was proved. The enquiry officer was appointed after this in June. 1994. He sent a letter dated 29.9.1994 to petitioner to be present on 10.10.1994. A copy of the letter has been filed as Annexure-11 to the writ petition. He did not mention that the enquiry officer proposed to record statement of the petitioner. He was required to be present with all material so that the enquiry proceedings may proceed. The letter did not disclose the material on which the enquiry officer proposed to hold enquiry. He must have been aware that the charge-sheet had not been served on petitioner yet he did not take any steps to serve the charge-sheet on petitioner to enable him to know what was the charge against him and what material the enquiry officer proposed to rely, The petitioner appeared on 10.10.1994 and his statement was recorded. A copy of the statement was not supplied to the petitioner. It has been filed as Annexure-2 to the counter-affidavit. The enquiry officer did not record any other evidence. There is no endorsement in the enquiry proceedings that the documents on which the enquiry officer proposed to rely were shown to the petitioner. Shri Chauhan has stated on oath that the petitioner was permitted inspection of documents and was shown all papers. It is denied in the rejoinder-affidavit. It was most unbecoming for a senior officer to have sworn the affidavit which on the face of it is incorrect. The entire enquiry was concluded by recording statement of petitioner only. There is nothing to show that the enquiry officer permitted inspection of documents or even brought the documents on record on which he relied in his report or supplied it to the petitioner. In the absence of any material or the enquiry officer's endorsement, the biased statement of Shri Chauhan cannot be believed. When no date was fixed after recording of petitioner's statement on 10.10.1994 it is clear that Shri Chauhan has sworn the affidavit without any basis. The entire enquiry was completed only on 10.10.1994 and that too by recording statement of petitioner only. The enquiry was, therefore, contrary to principles of natural justice. It was a mere formality. In absence of any material brought on record or examination of any witness to prove the charge of instigation, conspiracy amongst petitioner, driver, electrician and khalasi etc., stoppage of work and loss of reputation of the corporation and financial loss and its confrontation to the petitioner, the enquiry officer failed to observe even the elementary rules of holding enquiry in disciplinary proceedings. It is well-settled that in the disciplinary matters the burden is on the department. Since the enquiry officer made the recommendation without observing the basic requirement the entire proceedings were bad.

16. The first finding recorded by him is that the petitioner in reply to question

No. 4 stated that on 17.4.1994 and on 18.5.1994, he had gone to the office of assistant engineer to take leave whereas in reply to question No. 4, he said that he was on site. According to enquiry officer, the two statements being contrary, the petitioner tried to mislead the enquiry officer. But the enquiry officer did not bring on record any material to show that the petitioner did not go to the residence of the assistant engineer. He had clearly stated that when he went at the residence of assistant engineer, he was not present and he left the application at his residence in the presence of another person who was residing with assistant engineer in his room. The enquiry officer did not ask the petitioner about that man nor he produced him on behalf of the department to prove that the petitioner never went to his residence. In any case when the assistant engineer was not available and the petitioner could not obtain leave from him and he went to the site to collect his subsistence allowance there, it was not paid as the petitioner was not willing to accept envelope sent by Shri Chauhan without knowing its contents. There was contradiction in the two statements and attempt by the petitioner to mislead the enquiry officer. It shows that the enquiry officer was bent upon taking action against the petitioner, most probably under the influence of Shri Chauhan. Further this was never the charge against the petitioner.

17. The enquiry officer held that the first charge against the petitioner was proved as he admitted that he went to Sirsa River Bridge on 7.4.1994 without obtaining permission. He has misread the statement as petitioner in reply to question No. 12 said that he having come to know that workers have suffered, he in his capacity as officebearer of the union went to the site after obtaining permission from the assistant engineer to see the injured workers. The enquiry officer did not examine the assistant engineer nor brought on record any material to show that his statement was incorrect. The burden to prove that the petitioner went to the site without permission was on the management. He not only misread the statement but drew an incorrect inference against the petitioner. He further held that petitioner wrote a letter to Deputy Project Manager on the office-pad of his union, the contents of which show that the petitioner was not only present there on Kursaua Tamairi Road on 7.4.1994 but he instigated the workers and got the work stopped. And when the Deputy Project Manager asked him not to do so he misbehaved with him. He then mentioned that the petitioner took up issues for instance about the uniform. CPS No. etc. which Were not the duty of Lab assistant. He held that it was thus clear that he was not doing his work and taking interest in other work and impressed that he being Vice-President could go to head office without permission of assistant engineer. The enquiry officer held that no employee could leave his duty without permission, therefore, according to enquiry officer the charge against the petitioner was true. It is clear that the enquiry officer did not confront petitioner with any material. He recorded the findings without bringing any evidence on record. Even the letter written by the petitioner has not been produced, There was no evidence that the petitioner boasted of being office bearer of union or

that he was entitled to leave the office without permission. The enquiry officer has drawn inference on his imagination. He did not bring on record any evidence oral or documentary that the petitioner instigated the workers or asked them to stop the work.

18. Similarly, in respect of charge Nos. 2 and 3, the enquiry officer held that even though the petitioner denied about it but he having admitted that he left the head office without permission. It was grave misconduct. He further held that Sri Ramjee Singh, assistant engineer gave in writing to the Deputy Project Manager that petitioner and others were seen on the site. He further observed that Sri Malkhan Singh also gave in writing that the petitioner was seen with one of the employees at the residence of Shri N.P. Saxena. And Deputy Project Manager had written a letter to the District Magistrate on 10.4.1994 that the petitioner was obstructing. The enquiry officer held that from perusal of attendance register of the site that the workers did not turn up on 11.4.1994 which resulted in closure of work on 11.4.1994, it was clear that the petitioner must have misled the workers not to work on 10.4.1994. Consequently, the charge against petitioner was correct. It was a strange way of recording finding against petitioner. None of these documents were shown to the petitioner. They could not be relied.

19. As regards charge No. 4, the enquiry officer held that the petitioner in his reply had stated that he was on leave on 11.4.1994 but no application was available on the record. The enquiry officer has held that the petitioner claimed that his son was ill and he had gone for his treatment but when he was asked to substantiate, he could not produce any paper. He further has recorded the finding that the assistant engineer gave in writing to the Deputy Project Manager that the petitioner was not present at site from 11 to 17th May, 1994. Therefore, it appears that the petitioner misled the enquiry officer. The enquiry officer held that from the record it appeared that the work was standstill on 11.4.1994 and all the workers went to Etawah, where on coming to know that the information was wrong, they returned and the work started on 12.4.1994 but the petitioner was not present. The enquiry officer held that from perusal of the statement of the petitioner and record it appears that the petitioner must have misled the workers who after stopping the work must have come to Etawah, therefore, even this charge was proved. The report of the assistant engineer is based on report submitted by Shri Naresh Singh, helper. I have already mentioned that in this letter, the absence of petitioner was purposely added. In any case, without confronting the petitioner, no reliance could be placed on it. The finding that the petitioner must have misled, to say the least shows that the enquiry officer did not have even the barest knowledge of the rules of enquiry.

20. The enquiry officer held that the documents filed by the petitioner did not establish that he was not guilty. He further held that the complaint of petitioner that he was not paid his subsistence allowance was not correct as from records it appears that he himself did not accept. He further held that from the papers

given by Deputy Project Manager it was clear that the petitioner must have been responsible for stoppage of work. The enquiry officer held that the petitioner did not accept the letter sent on 11.5.1994, 13.5.1994 and 17.5.1994 which was grave misconduct under the standing orders. He further held that the petitioner repeatedly tried to mislead the enquiry officer. Therefore, the petitioner was guilty of grave misconduct of the standing orders of the corporation and the violation of sub-paras 2 (2), (7), (8), (14), (25) and (31) was fully proved. This finding of the enquiry officer was accepted by Shri Chauhan, Deputy Project Manager, who passed the impugned order as all the charges were found proved by the enquiry officer who made the recommendation after giving full opportunity to petitioner. Each and every reasoning and finding of the enquiry officer is not only faulty but demonstrates that he conducted the enquiry without any regard to the standing orders. The finding that from the papers filed by the petitioner, it was not established that he was not guilty was contrary to basic rule that the charges have to be proved by the employer. As regards refusal to accept the charge-sheet, the petitioner in his statement before the enquiry officer had stated that on 11th and 13th May, 1994, he had taken his son to Etawah for medical examination after taking leave, therefore, there was no question of petitioner's refusal to take the charge-sheet. He also explained that the sealed envelope on 17th May, 1994, was not accepted as petitioner was not told its contents and it was linked with payment of subsistence allowance. The enquiry officer did not examine Shri Naresh Singh helper, nor afforded any opportunity to cross-examine him. He did not supply even a copy of the report, which has been filed as Annexure-CA-4 to the counter-affidavit. The finding of the enquiry officer that the petitioner was guilty of grave misconduct in not accepting the charge-sheet and tried to mislead the enquiry officer, thus, was based on no legal or admissible evidence. It was conjectural and imaginary. The finding that the letter of the Deputy Project Manager shows that petitioner must have misled the workers for stopping the work is illegal. The petitioner was not confronted with this letter. The enquiry officer, thereafter, repeated verbatim what was stated in the charge-sheet that violations of different paragraphs of standing orders was proved.

21. The order of dismissal, therefore, was not only contrary to law, violative of principles of natural justice but was against standing order. The findings recorded by the enquiry officer were against the basic principles of holding departmental disciplinary proceedings. The enquiry officer relied on material without apprising or confronting the petitioner. The findings recorded by him were not based on facts on record. He held petitioner guilty of misleading him without any charge or any material except his imagination. Such report could not furnish material for dismissing the petitioner. The approach and attitude of the Deputy Project Manager Justifiably gave rise to reasonable apprehension as claimed by petitioner and argued by his learned counsel that the entire proceedings were motivated and the Deputy Project Manager intentionally, knowingly and deliberately filed the complaint against the petitioner, suspended him, deprived

him of his subsistence allowance, framed charge-sheet, monitored entire proceedings and even controlled the enquiry by pre-Judging that the charges against petitioner were proved.

22. This gives rise to an important question whether the nonpayment of subsistence allowance, deliberately and intentionally and being judge of own complaint knowingly to harm the employee was malice in law and if so its effect. In Salmond and Heuston on the Law of Torts, 21st edition, 1996, the term malice, as used in law has been defined to possess two different meanings. It signifies either (1) the intentional doing of a wrongful act without Just cause or excuse, or (2) action determined by an improper motive. It is clear from the aforesaid definition that any motive is malicious which is not recognised by law as a sufficient and proper one for the act in question. Malice in legal sense means a wrongful act, done intentionally without just cause or excuse. I have already mentioned detailed facts. They clearly indicate that Shri Chauhan deliberately and intentionally not only suspended the petitioner but deprived him of his subsistence allowance and secured his dismissal by an enquiry in name only, therefore. It was malice in law. Shri Chauhan while appointing enquiry officer took no chances and expressed his opinion clearly and unambiguously in the charge-sheet resulting in no enquiry except the reiteration of Shri Chauhan's opinion in the shape of finding by enquiry officer. It was intentional doing of a wrongful act without just cause. The proceedings commencing from suspension of the petitioner leading to his dismissal being actuated with malice in law were invalid and are liable to be quashed for this reason as well.

23. This takes us to the larger issue argued by the learned counsel for the petitioner about accountability of respondents and whether they are liable to compensate the petitioner monetarily for malicious action of their officers. The law has been settled in Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others, that the Court in exercise of its jurisdiction can award exemplary compensation against public officers for breach of public duty. I have no doubt in my mind that the action of Shri Chauhan satisfied the ingredients of malice in law. He compounded it further by stating incorrect facts in the counter-affidavit. But Shri Rajvanshi persuaded me to refrain from taking this extreme action awarding damages, as it would saddle the corporation for no fault of their's.

24. In the result, the writ petition succeeds and is allowed. The dismissal order dated 8.4.1995 passed by respondent Nos. 1 and 2, Annexure-20 to the writ petition is quashed with all benefits of service to the petitioner. The petitioner shall be reinstated in service forthwith and paid his entire arrears of salary. The aforesaid direction shall be complied by the respondents within two months from the date a certified copy of this order is produced before respondent No. 3.

25. The petitioner shall be entitled to his costs.