

(2018) 03 MP CK 0064

In the Madhya Pradesh High Court

Case No : WRIT PETITION NO. 3688 OF 2017

Bhagirat Sharma

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 15-03-2018

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Delhi Police (F&A) Rules, 1980 — Rule 16(3)

Citation : (2018) 03 MP CK 0064

Hon'ble Judges : VIVEK RUSIA, J

Bench : Single Bench

Advocate : Manoj Manav, Bharti Lakkad

Final Decision : Allowed

Judgement

The petitioner has filed the present petition challenging the order dated 29.05.2017 by which application for appointment of defence assistance in the departmental enquiry and supply of relevant documents has been rejected.

The petitioner is at present posted as Head Constable in police station "Ghatiya, District Ujjain (M.P.). According to the petitioner, he made a

complaint against the higher officers in respect of creation of forge documents. In order to take revenge and to put undue pressure on him, the

department has issued charge sheet dated 23.07.2017 to him. After receipt of charge sheet, the petitioner has demanded documents to submit the

effective reply but he was denied the important documents. Some how, he submitted reply on 23.01.2017. Being dissatisfied with the reply, the

respondents have appointed respondent No.3 as an enquiry officer. The petitioner has filed an application for change of the enquiry officer as he was

threatened him. The said prayer has also been turned down and same enquiry

officer continued with the enquiry. Again the petitioner has submitted an application that enquiry initiated on his complaint is pending before the higher officers the impugned charge sheet relates to same conduct of the petitioner, therefore, the departmental enquiry be stayed till the conclusion of the said enquiry. The aforesaid prayer was also not considered and the enquiry officer has continued with the enquiry and recorded the statements of the witnesses without giving any opportunity to the petitioner to cross - examination. The superintendent of police, Ujjain and Inspector General of Police, Indore Division both have directed the enquiry officer to grant proper opportunity to the petitioner but the enquiry officer has ignored the directions given by S.P., Ujjain and I.G. Indore Division.

The petitioner has submitted an application for leave as he fell sick on 24.05.2017. That, alongwith the application he submitted certificate issued by medical officer District Hospital, Ujjain. The petitioner applied for one month leave from 24.05.2017. The enquiry officer has also rejected the prayer of the petitioner for appointment of defence assistance on the ground that particular co-employees is already conducting two enquires as defence assistance, because, as per circular of State Government, the co-employee who is conducting two departmental enquiry as defence assistant, cannot be a defence assistance in third departmental enquiry. Being aggrieved by the aforesaid orders the petitioner has filed present petition .

After issuance of notice, the enquiry officer has completed the enquiry and submitted the enquiry report. By way of amendment the petitioner has challenged the enquiry report also which was communicated to him vide letter dated 22.06.2017.

The State Government filed the reply as well as additional reply refuting the allegations made by the petitioner in the writ petition.

The petitioner has filed the order dated 18.01.2018 Annexure P-18 alongwith list of documents of by which S.P. Ujjain has sanctioned the medical leave for 48 days from 24.05.2017 to 10.07.2017.

I have heard Shri Manoj Manav, learned counsel for the petitioner and Ms. Bharti Lakkad, learned counsel for the respondents.

The sole question involves in this petition whether the petitioner was given proper opportunity of hearing in the departmental enquiry or not ? Law in respect of providing the hearing in accordance with the principle of natural

justice has been well settled by the Apex Court in following cases in which it has been held the natural justice requires that all witnesses in the departmental enquiry shall be examined in presence of the delinquent. The operative parts of the same of the judgments are reproduced below:

14. In fact the Supreme Court in the case of State of Mysore and Others vs. Shivabasappa Shivappa Makapur, AIR 1963 SC 375, while dealing with such cases, has held that the statement given by a witness previously behind the back of the party, is required to be put to him again in the disciplinary proceedings and is required to be admitted in evidence and thereafter a copy thereof should be given to the party and he should be given an opportunity to cross-examine him. It has further been held that the rules of natural justice are sufficiently complied with when previous statements given by the witnesses are read over to them, marked on their admission, copies thereof are given to the party and he is given an opportunity to cross-examine them, in the following terms in para -6:-

(6).... Discussing next what those rules required, it was observed that the person against whom a charge is made should know the evidence which is given against him, so that he might be in a position to give his explanation. When the evidence is oral, normally the examination of the witness will in its entirety, take place before the party charged, who will have full opportunity of cross-examining him. The position is the same when a witness is called, the statement given previously by him behind and back of the party is put to him, and admitted in evidence, a copy thereof is given to the party, and he is given an opportunity to cross-examine him. To require in that case that the contents of the previous statement should be repeated by the witness word by word, and sentence by sentence, is to insist on bare technicalities, and rules of natural justice are matters not of form but of substance. In our opinion they are sufficiently complied with when previous statements given by witnesses are read over to them, marked on their admission, copies thereof given to the person charged, and he is given an opportunity to cross-examine them.

15. The aforesaid decision of the Supreme Court was again considered and relied upon in the case of Kuldeep Singh Vs. The Commissioner of Police and others, AIR 1999 SC 677, wherein it has been held that reasonable opportunity, as contemplated by Article 311 (2) of the Constitution of India, has

to be provided which means "Hearing" in accordance with the principles of natural justice which requires that all the witnesses in the

departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them, in para 32, in the

following terms:

"32. Apart from the above, Rule 16 (3) has to be considered in the light of the provisions contained in Article 311 (2) of the Constitution to find out

whether it purports to provide reasonable opportunity of hearing to the delinquent. Reasonable opportunity contemplated by Article 311 (2) means

"Hearing" in accordance with the principles of natural justice under which one of the basic requirements is that all the witnesses in the

departmental enquiry shall be examined in the presence of the delinquent who shall be given an opportunity to cross-examine them. Where a

statement previously made by a witness, either during the course of preliminary enquiry or investigation, is proposed to be brought on record in the

departmental proceedings, the law as laid down by this court is that a copy of that statement should first be supplied to the delinquent, who should

thereafter be given an opportunity to cross-examine that witness."

In the aforesaid case, the Supreme Court in fact set aside the punishment imposed upon the petitioner therein based upon statement of witnesses who

were not produced in the departmental enquiry, in the following terms in paras 35 & 41.

"35 Having regard to the law as set out above, and also having regard to the fact that the factors set out in Rule 16 (3) of the Delhi Police (F&A)

Rules, 1980, did not exist with the result that Rule 16 (3) itself could not be invoked, we are of the opinion that the Enquiry Officer was not right to

bringing on record the so-called previous statement of witnesses Radhey Shyam and Rajpal Singh. 41. Smt. Meena Mishra, appearing as a

witness for the Department, denied having made any payment to the appellant on that day. The labourers to whom the payment is said to have been

made have not been produced at the domestic enquiry. Their so-called previous statement could not have been brought on record under Rule 16 (3).

As such, there was absolutely no evidence in support of the charge framed against the appellant and the entire findings recorded by the Enquiry

Officer are vitiated by reason of the fact that they are not supported by any

evidence on record and are wholly perverse.â??

16. In the case of A. Sudhakar vs. Postmaster General, Hyderabad and Another, (2006) 4 SCC 348, the Supreme Court has enumerated the

procedural requirements, based on the principles of natural justice embodied under Rule 311 (2) of the Constitution of India, which are required to be

followed in the disciplinary proceedings, in the following terms in para 25 & 26:-

â??25. In terms of Article 311 (2) of the Constitution, the procedural requirements which were required to be followed were as under:

(i) opportunity to the officer concerned to deny his guilt and establish his innocence which means he must be told that what the charges against him

are and the allegations on which such charges are based;

(ii) he must be given a reasonable opportunity to cross-examine the witnesses produced against him and examine himself or other witnesses on his

behalf; and

(iii). he must be given opportunity to show cause that the proposed punishment would not be proper punishment to inflict which means that the

tentative determination of the competent authority to inflict one of the three punishments must be communicated to him.

26. It is well-settled that those principles of natural justice are not embodied principles. The requirements contained in Article 311 (2) of the

Constitution in view of the decision of this Court in Khem Chand vs. Union of India (1958) SCR 1081, are held to be as a part of the principle of

natural justice. The courts in the aforementioned situation are required to see as to whether non-observance of any of the said principles in a given

case has resulted in denial of justice. If there had been substantial compliance of the procedure, the court may not interfere. (See. State of U.P. v.

Om Prakash Gupta (1969) 3 SCC 775 and Kuldeep Singh vs. The Commissioner of Police and others, AIR 1999 SC 677."

17. In the case of Rajkishore Pandey vs. Rewa-Sidhi Gramin Bank and another, 1989 MPL J 530, it has been held by a Division Bench of this Court

that the findings recorded in the Fact Finding Inquiry cannot be made the basis for punishing a person in a departmental proceedings without

independently examining the witnesses in the Departmental Enquiry again and without giving an opportunity of cross-examining them to the delinquent

officer, in the following terms in para 12:--

12. Thus after examining the aforesaid facts and circumstances of the case and the decisions of the Supreme Court, it is now clear that normally the evidence on which the charges are sought to be proved must be led in the enquiry itself in the presence of the delinquent officer and unless there are compelling reasons the enquiry authority should not bring on record the previously recorded statements of the witnesses before the delinquent officer concerned for cross-examination after furnishing him a copy of those previously recorded statements. In the present case, neither the record of the departmental enquiry nor the return filed by the respondents goes to show any reasons which compelled the Enquiry Officer to resort to the aforesaid procedure, that is to say, to take on record the previously recorded statements of the witnesses by the C.B.I Inspector and to accept and rely on the same, instead of recording the evidence of the witnesses in the enquiry proceedings in the presence of the petitioner, even though the said previously recorded statements were neither read over to most of the witnesses nor the witnesses read the same by themselves before saying that those statements be treated as their statements in the enquiry proceedings. Since the Enquiry Officer in his report as well as the disciplinary authority has formed the opinion that the misconduct was established against the petitioner on the basis of collective consideration of the evidence of those witnesses who had their previously recorded statement accepted to be their correct statements as well as the evidence of those witnesses to whom their previously recorded statements were neither read out nor they themselves read the same yet accepted the same as their statements. That being so, the Enquiry Officer was not justified in bringing on record the previously recorded statements even of those witnesses who had neither themselves read the statements nor the same were read out to them by Enquiry Officer or by the Presenting Officer. The disciplinary authority also should not have relied on such statements while passing the impugned order of termination of petitioner's service. Thus, it is established beyond doubt that the Enquiry officer violated the well settled principles of natural justice which vitiated the whole proceedings and consequently the order of the petitioner's dismissal was also bad and could not be sustained in law. Since the petition succeeds on the aforesaid ground it is not necessary for us to go into other grounds raised by the learned counsel for the petitioner.

18. The same view has been reiterated by the Division Bench of this Court in the case of Hardayal Bhagirathi Vahatwar vs. Union of India and others,

W. P(S). No.7552/2004 decided on 8-4-2008 in paras 7 & 8 as under:--

7. It is submitted by the learned counsel for the petitioner, by placing reliance on the judgment of this Court in the case of Rajkishore Pandey vs.

Rewa-Sidhi Gramin Bank and another, 1989 MPL J 530, that a person can be held to be guilty in Departmental Proceedings only on the basis of the

evidence recorded during the Departmental Proceedings itself and not on the basis of the statement of witnesses recorded during a preliminary fact

finding enquiry unless and until the same witnesses are again examined in the regular departmental enquiry and reiterate the same statements against

the delinquent during the Departmental Proceedings. On failure to examine such witnesses or in the absence of reaffirmation of their statements

during the regular departmental enquiry any statement or allegations made by such witness previously during a fact finding or a preliminary enquiry,

have to be ignored and cannot form the basis of recording a conclusion in the Departmental Proceedings.

8. We are in full agreement with the aforesaid proposition of law and are of the considered opinion that the contention of the learned counsel for the

petitioner deserves to be accepted.

The allegation against the petitioner is that he misbehaved on 12.09.2016 with constable Shaitan Singh. The petitioner has denied the charges on the

ground that he was not on duty in police station at the relevant time and Rojnamacha has been forged to show his presence, therefore, he demanded

the copy of Rojnamacha. By letter dated 05.02.2017 he has demanded various other documents. Vide letter dated 19.05.2017 the enquiry officer has

directed the petitioner to appear in the enquiry on 22.05.2017 at 11.30 a.m. The petitioner submitted an application that he became sick on 24.05.2017,

hence medical leave for the period of one month be granted. Despite the aforesaid letter the enquiry officer has recorded the statement of witnesses

in absence of the petitioner by proceeding him ex-parte.

Vide letter dated 22.06.2017, the petitioner was informed that he has been proceeded ex parte- and enquiry report has been submitted. The petitioner

has submitted an application for medical leave then the enquiry officer ought to not have proceeded further in enquiry. The Superintendent of police,

Ujjain has sanctioned the medical leave of the petitioner from 24.05.2017 to 10.07.2017 and during this period the enquiry officer has completed the enquiry. The copy of order dated 18.01.2018 in respect of leave the petitioner is reproduced below: â?

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fuEufyf[kr vf/kdkjh@deZpkjh dh chekjh vof/k dk fujkdj.k muds uke ds le{k n'kks;suqlkj vftZr vodk'k Lohd`r dj fd;k tkrk gS%&

1- vkj-1737 vfuy ijokj] uhyxaxk 25 fnu fn- 26-04-17 ls 20-05-17

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2- vkj- 1365 /kesZUnz] ukuk[ksM+k 15 fnu fn- 31-08-17 ls 11-07-17

rd

3- evkj-375 jf'e lkgw] iq- ykbZu 15 fnu fn- 27-06-17 ls 11-07-17

rd

4- izvkj- 1730 HkkxhjFk ?kfV;k 48 fnu fnu 24-05-17 ls 10-07-

17 rd

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1& jf{kr fujh{k okLrs vks-ch A

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3- izHkkjh ftfo'kk ftyk mTtSu dh vksj lwpukFkZ A

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The respondent has not disputed that issuance of letter dated 18.01.2018 by which medical leave of the petitioner has been sanctioned. Therefore, the enquiry conducted behind the back of the petitioner cannot be sustained in light of aforesaid judgment of Apex Court.

The petitioner has sought permission to engage head constable Rajendra Kumar as defence assistance vide letter dated 29.05.2017. The enquiry officer has rejected the said prayer on the ground that he is already conducting two enquires as defence assistance. Having rejected the prayer of the petitioner on 29.05.2017 the enquiry officer has proceeded him ex-parte on 16.07.2017. The petitioner was not given any opportunity of hearing or engage the another defence assistance. That, in the departmental enquiry the employees who knows the procedure of departmental enquiry and act as defence assistance are very limited and Government has also put restrictions that one employee cannot become defence assistance in more than two enquires, therefore, sufficient time ought to have been granted to the petitioner to search and engage another defence assistance. But in the present case no sufficient opportunity was granted to the petitioner to engage another defence assistance and enquiry officer has proceeded ex-parte. Due to sickness neither the petitioner appeared nor the defence assistance was there, therefore the enquiry officer has wrongly proceeded ex-parte in the enquiry. It is clear violation of the rules of M.P. Civil Services (Classification Control and Appeal) Rules 1966. Hence, the enquiry report submitted by enquiry officer is hereby set aside and matter is remitted back to the enquiry officer to start the enquiry again from the stage of appointment of defence assistance.

With the aforesaid directions, the petition is stands allowed.