
(2018) 01 AHC CK 0058
In the Allahabad High Court
Case No : 47078 of 2012

Bhupat Singh Yadav

APPELLANT

Vs

State Of U.P. And Anr.

RESPONDENT

Date of Decision : 08-01-2018

Acts Referred:

[Constitution of India](#), [Article 311\(2\)](#) -
Dismissal, removal or reduction in rank of persons employed in civil capacities under
the Union or a State

Citation : (2018) 01 AHC CK 0058

Hon'ble Judges : Sangeeta Chandra

Bench : Single Bench

Advocate : Siddharth Khare,Ashok Khare

Judgement

1. This writ petition has been filed by the petitioner challenging the order dated 13.7.2012 passed by the Commandant, 42nd Battalion, PAC, Naini, Allahabad treating the period when the petitioner remained out of service w.e.f. 9.10.1999 to 24.3.2008 as "period not spent on duty" and hence not entitled for any payment under the principle of "no work no pay" and the order dated 16.2.2013 passed by the Deputy Inspector General, PAC, Kanpur Section, Kanpur and the order dated 24.8.2013 passed by the Inspector General of Police, PAC, Eastern Zone, Lucknow rejecting his Revision thereafter.

2. A further prayer has been made for a mandamus to be issued to the Authorities to treat the period of service from 9.10.1999 to 24.3.2008 as "period spent on duty" and to disburse the petitioner's arrears of salary and to refix his salary taking into account his entire length of service after including annual increments etc. and pay revision w.e.f. 1.1.2006.

3. Counsel for the petitioner, Sri Siddhartha Khare at the time of argument of the case stated that earlier the writ petitioner had been dismissed from service on 9.10.1999, without holding any enquiry in exercise of power under Rule 8-2(B) of the U.P. Police Officers of the Sub-Ordinate Ranks (Punishment and Appeals)

Rules, 1991 (herein after referred to as the Rules of 1991). This order was confirmed in Appeal and Revision on 3.1.2000 and 29.12.2004 respectively and aggrieved by the aforesaid three orders, the petitioner had filed Writ Petition No. 55846 of 2005 (Bhupat Singh Yadav Vs. State of U.P. & others).

4. This Court by a detailed judgment and order dated 18.8.2006 set aside the order of dismissal on the grounds that this case was not such where exercise of power under Rule 8-2(B) of the Rules of 1991 could have validly been made by the Commandant, but this Court left it open to the Authorities to conduct a fresh enquiry in accordance with the principles of natural justice and pass appropriate orders thereon.

5. It has been argued by Sri Siddharth Khare that after this Court allowed Writ Petition No. 55846 of 2005, the State respondents went up in Appeal before the Supreme Court and the SLP was also dismissed on 19.11.2007. The petitioner was thereafter reinstated on 18.3.2008 by order of the Commandant and he resumed duties on 25.3.2008. The petitioner was however paid salary as was given to him in the year 1999, without adding any increments or even revising his pay scale in pursuance of the Pay Commissions Recommendations of 2006.

6. Fresh disciplinary proceedings were held against the petitioner and by order dated 30.12.2009, the penalty of withholding two annual increments for a period of one year, only was inflicted upon the petitioner.

7. Again on 28.3.2012, a fresh show cause notice was issued to the petitioner to show cause as to why arrears of salary for the period w.e.f. 9.10.1999 to 24.3.2008 be not withheld on the grounds of "no work no pay". The petitioner submitted his reply to the said show cause notice on 8. 4.2012, but his case was arbitrarily rejected by the Commandant and the order dated 13.7.2012 was passed directing withholding of arrears of salary for the period w.e.f. 9.10.1999 to 24.3.2008, and also diverting that the said period should not be included as "period spent on duty". Aggrieved by the order passed by the Appointing Authority, the petitioner filed an Appeal, which was rejected on 16.2.2013 and his Revision was also rejected on 24.8.2013.

8. The petitioner has challenged the aforesaid three orders. Initially only the punishment order was challenged in this writ petition, later on during the pendency of this writ petition, the petitioner's Appeal was decided and the Revision was also rejected, and these orders have been challenged by moving an Amendment Application No 42437 of 2016, which has been allowed by this Court on 6.2.2016, and the relief clause and grounds of the writ petition have been appropriately amended.

9. Sri Siddharth Khare has argued that this Court had found the dismissal order dated 9.10.1999 to have been passed denying opportunity of hearing to the petitioner and the exercise of power under proviso to Rule 8-2(b) was found to be vitiated. It was however left open by this Court that the Authorities may conduct a fresh enquiry / regular disciplinary proceedings. The State respondents

thereafter delayed the conduct of the Regular disciplinary proceedings.

10. This Court has in its judgment rendered on 22.9.2017 in Writ-A No. 41804 of 2014 (Chandra Bhan Singh Vs. State of U.P. & 3 others) considered the law by Hon''ble Supreme Court in paragraphs 19, 21, 22, 23, 24, 25 & 26, which are being quoted herein below:- "19. The Hon''ble Supreme Court considered the law as laid down by three Judges Bench in Hindustan Tin Works Pvt. Ltd. vs Employees of Hindustan Tin Works Pvt. Ltd., 1979 (2) SCC 80 and the judgment rendered by another three Judges Bench in Surendra Kumar Verma vs Central Government Industrial Tribunal-cum-Labour Court, New Delhi, 1980 (4) SCC 443 and came to the conclusion that the law has been developed further. Reliance cannot be placed on a strait-jacket formula for awarding relief of back wages.

21. The Hon''ble Supreme Court in the aforesaid case of Deepali Gundu Surwase (supra) has considered the law with respect to industrial disputes, wherein retrenchment orders or termination orders were challenged and were set aside.

22. The Hon''ble Supreme Court considered the question as decided in J.K. Synthetics Ltd. vs K.P. Agrawal and Another, 2007 (2) SCC 433, wherein two Judges Bench had observed that there is also a misconception that whenever reinstatement is directed, "continuity of service" and "consequential benefits" should follow, as a matter of course. The disastrous effect of granting several promotions as a "consequential benefit" to a person, who has not worked for 10 to 15 years and who does not have the benefit of necessary experience for discharging the higher duties and functions of promotional posts, is seldom visualised while granting consequential benefits automatically. Whenever courts or tribunals direct reinstatement, they should apply their judicial mind to the facts and circumstances to decide whether "continuity of service" and/or "consequential benefits" should also be directed. With regard to back wages and whether they should be awarded in full or partially, any income received by the employee during the relevant period on account of alternative employment or business was a relevant factor to be taken note of while awarding back wages.

Therefore, it was necessary for the employee to plead that he was not gainfully employed from the date of his termination. While an employee cannot be asked to prove the negative, he had to at least assert on oath that he was neither employed nor engaged in any gainful business or venture and that he did not have any income. Then the burden will shift to the employer.

23. The Hon''ble Supreme Court in J.K. Synthetics (supra) also considered several judgments and held that most cases where back wages were awarded, related to retrenchment/termination, which were held to be illegal and invalid for non-compliance with statutory requirements or related to cases where the Court found that the termination was motivated or amounted to victimization. Such decisions however, were found to be having no application to the case where dismissal or removal or compulsory retirement is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding

regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee. Where the power under Article 226 is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement; and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc.

24. The Hon"ble Supreme Court has further observed that there are two exceptions to this effect held as propounded by it. The relevant paragraph is being quoted herein-below:

"But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct, as a camouflage to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination."

25. The Hon"ble Supreme Court in Deepali Gundu Surwase (supra) has however observed that the observations made in J.K. Synthetics Ltd. (supra) that on

reinstatement the employee/workman cannot claim continuity of service as of right, is contrary to the ratio of the judgments of three Judges Benches referred to above, and cannot be treated as good law.

26. The Hon'ble Supreme Court found on the facts of the case that the appellant's services had been wrongly dispensed with. The School Tribunal had found the action of the management to be wholly arbitrary and vitiated due to violation of the rules of natural justice. The Tribunal has further found that the allegations levelled against the appellant were frivolous. The Tribunal had also taken cognizance of the statement made on behalf of the appellant that she was not gainfully employed anywhere, and the fact that the management had not controverted the same and ordered her reinstatement with full back wages. The Hon'ble Supreme Court observed that the High Court erred in setting aside the order passed by the School Tribunal."

11. A Division Bench of this Court in Brijendra Prakash Kulshrestha Vs. Director of Education, U.P., Allahabad & others 2007 (3) ADJ 1 (DB) supra) considered the applicability of "no work no pay" and it has been held that an employer cannot deny salary to an employee, who is always ready and willing to work, but was not allowed to do so by an Act or omission directly attributable to the employer.

12. This Court has considered case law and has observed that where the dismissal or termination has been found to be illegal by the courts and no fresh order of punishment is passed, then back wages or full arrears of salary are provided. In cases where superannuation has been forcibly imposed and the employer concerned has not been allowed to work even though he was willing to work full back wages are usually given. However it has further observed "thus, while considering the question of arrears of salary where the employee could not work for an act of the employer which is found to be illegal or unauthorised, the direction for payment of full salary or arrears of salary is not automatic or mechanical but has to be considered in the light of the numerous attending circumstances and the facts of the case.-----"

13. However, Sri Jai Singh Chandel, learned standing counsel appearing for the State respondents has pointed out Chapter VIII of the Financial Hand Book, Volume II, parts 2 to 4 and argued that whenever a suspension or dismissal order is set aside resulting in reinstatement the provisions of Chapter 8 would be applicable.

14. The relevant paragraph of Chapter VIII i.e. Fundamental Rules 52, 54 & 54-A are being quoted herein below:- Fundamental Rule "52. The pay and allowance of a government servant who is dismissed or removed from service cease from the date of such dismissal or removal.

Fundamental Rule 54. (1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order reinstatement shall

consider and make a specific order-

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal, or compulsory retirement, as the case be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority competent to order reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired, has been fully exonerated the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In cases other than those covered by sub-rule (2) [including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of noncompliance with the requirements of clause (1) or clause (2) of article 311 of the Constitution and no further inquiry is proposed to be held], the Government servant shall, subject to the provisions of sub-rules (6) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection, within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

Provided that any payment under this sub-rule to a Government servant {other than a Government servant who is governed by the provisions of the Payment of

Wages Act 1936 (4) of 1936} shall be restricted to a period of three years immediately preceding the date on which orders for reinstatement of such Government servant are passed by the Appellate Authority or Reviewing Authority, of immediately preceding the date of retirement on superannuation of such Government servant, as the case may be.

(5) In a case falling under sub-rule (4), the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be so treated for any specified purpose :

Provided that if the Government servant so desires such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement as the case may be, shall be converted into leave of any kind due and admissible to the Government servant."

Note:- The order of the competent authority under the preceding proviso shall be absolute and no higher sanction shall be necessary to the grant of-

(a) extraordinary leave in excess of three months in the case of temporary Government servant, and

(b) leave of any kind in excess of five years in the case of permanent or quasi-permanent Government servant.

(6) The payment of allowances under sub-rule (2) or sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The amount determined under the proviso to sub-rule (2) or under sub-rule (4) shall not be less than the subsistence allowances and other allowances admissible under rule 53.

(8) Any payment made under this rule to a Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of reinstatement. Where the emoluments admissible under the rule are equal to or less than the emoluments earned during the employment elsewhere, nothing shall be paid to the Government servant.

Fundamental Rule 54-A (1) Where the dismissal, removal or compulsory retirement of a Government servant is set aside by a court of Law and such Government servant is reinstated without holding any further inquiry, the period of absence from duty shall be regularised and the Government servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the court.

(2) (i) Where the dismissal, removal or compulsory retirement of a Government

servant is set aside by the court solely on the ground of non-compliance with the requirements of clause (1) or clause (2) of article 311 of the Constitution, and where he is not exonerated on merits , and no further inquiry is proposed to be held, the Government servant shall, subject to the provisions of sub-rule (7) of rule 54, be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been dismissed , removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice:

Provided that any payment under this sub-rule to a Government servant other than a Government servant who is governed by the provisions of Payment of Wages Act, 1936 (4 of 1936) shall be restricted to a period of three years immediately preceding the date on which the judgment of the court was passed or the date of retirement on superannuation of such Government servant, as the case may be.

(ii) The period intervening between the date of dismissal , removal or compulsory retirement including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, and the date of judgment of the court shall be regularised in accordance with the provisions contained in subrule (5) of rule 54.

(3) If the dismissal, removal or compulsory retirement of a Government servant is set aside by the court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal, or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be.

(4) The payment of allowances under sub-rule (2) or sub-rule (3) shall be subject to all other conditions under which such allowances are admissible.

(5) Any payment made under this rule to a Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of dismissal, removal or compulsory retirement and the date of reinstatement . Where the emoluments admissible under this rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant.

(emphasis supplied)

15. It is evident from a perusal of the aforesaid cited paragraphs of Chapter VIII of the Financial Hand Book, Volume II, parts 2 to 4 that the case of the petitioner does not strictly fall under any of the Fundamental Rules in so far as although the dismissal of the petitioner was set aside by this Court solely on the ground of non compliance of requirement of clause 2 of Article 311 of the Constitution he was not exonerated on merits in the fresh enquiry conducted by the State respondents and the petitioner was punished with a minor penalty.

16. Rule 54 says that the Government servant, who has been dismissed, removed or compulsorily retired, is reinstated as a result of Appeal or review, and the Authority competent to orders such reinstatement is of the opinion that the Government servant has been fully exonerated, then he has been paid his full salary and allowances to which he would have to be entitled had the punishment order not been passed. Such pay and allowances were however subject to the proviso that they would not be admissible for not more than 3 years immediately preceding the date on which orders for reinstatement of such Government servant are passed, and also the period of absence from duty shall be regularised by converting it into leave of any kind due and admissible to the Government servant.

17. Any payment made under this Rule to a Government servant on his reinstatement was to be subject to adjustment of amount, if any, earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of such reinstatement.

18. The Fundamental Rules 54 & 54-A do not talk of cases where dismissal, removal or compulsory retirement is replaced by a fresh order of punishment, if such dismissal is set aside because of non compliance of procedure requirement of Article 311(2), and liberty is granted to conduct fresh enquiry. In such disciplinary proceedings, if a punishment order is passed, even though minor in nature, such Government servant cannot be said to be completely exonerated in the fresh enquiry and it cannot be said that the initial act of misconduct has been wiped out completely.

19. Sri Jai Singh, learned standing counsel has also relied upon judgment rendered by Hon'ble Supreme Court in Northern-East Karnataka Road Transport Corporation Vs. M. Nagangouda 2007 (10) SCC 765, wherein the Supreme Court has considered whether gainful employment would also include self employment wherefrom some income is generated.

20. The Supreme Court held that since the respondent therein was earning some amount from his agricultural pursuits to maintain himself, he could be treated as a gainfully employed and adjustment of income from such gainful employment was permissible.

21. Having considered the rival submissions, this Court is of the opinion that after fresh enquiry was conducted the petitioner was awarded a minor penalty of

temporary stoppage for two increments for a period of one year. The initial order of dismissal was replaced by this minor penalty and it was not as if the petitioner stood completely exonerated, in the fresh disciplinary proceedings by the State respondents.

22. Hence, looking into the provisions of the Financial Hand Book, this Court deems it a fit case, in which although the petitioner can be held to be entitled to payment of salary and for treating the period w.e.f. 9.10.1999 to 24.3.2008, as "period spent on duty" for all other purposes including continuity in service, refixation of salary and pension etc., full arrears of salary however cannot be given, and the same has to be limited to a period of three years from the date of reinstatement i.e. such salary would be admissible to the petitioner w.e.f. 25.3.2005 only.

23. The period of absence will have to be regularised by granting all kinds of permissible leave including extraordinary leave as admissible to the petitioner, and he may be asked to furnish details of gainful employment during the period when he remained out of service in pursuance to the initial order of dismissal dated 9.10.1999, upto the period of his reinstatement. Adjustment thereafter can be made from dues admissible to him on such reinstatement.

24. The impugned orders are set aside with the observation that the Appointing Authority shall pass fresh orders, after the petitioner submits an affidavit regarding his gainful employment or otherwise, during the period he remained out of service, and in the light of the observations made herein above, within a period of three months.

25. The writ petition is partly allowed to this extent.