

(2014) 11 AHC CK 0167

In the Allahabad High Court

Case No : Special Appeal Defective No. 880 of 2014

Dakshinanchal Vidyut Vitran Nigam Ltd. and Others

APPELLANT

Vs

Aziz Ullah

RESPONDENT

Date of Decision : 10-11-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 11 ADJ 149 : (2015) 3 ALJ 540 : (2015) 109 ALR 55 : (2015) 1 AWC 35 : (2015) 146 FLR 239 : (2014) 4 UPLBEC 3268

Hon'ble Judges : Vijay Lakshmi, J; Rakesh Tiwari, J

Bench : Division Bench

Advocate : Baleshwar Chaturvedi, Advocates for the Appellant; Shekhar Srivastava, Advocates for the Respondent

Judgement

Rakesh Tiwari, J.—Heard learned counsel for the appellants on Civil Misc. Delay Condonation Application No. 344900 of 2014 and perused the affidavit filed in support of this application. Cause shown for delay in filing the special appeal is sufficient. Delay is condoned and the Application for Condonation of Delay is allowed. Heard learned counsel for the appellants on merit of the appeal also and perused the record.

The appellants have filed this intra Court appeal challenging the validity and correctness of the impugned judgment and order dated 24.7.2014 passed by the Writ Court in Civil Misc. Writ Petition No. 30714 of 2012, Aziz Ullah v. Dakshinanchal Vidyut Vitran Nigam Limited and others, whereby the aforesaid writ petition was allowed.

2. Brief facts giving rise to the instant appeal are that the respondent was initially appointed in 1971 as Kuli on Class-IV post with Dakshinanchal Vidyut Vitran Nigam Limited, Agra, and thereafter on qualifying examination, he was promoted on Class-III post as Technical Grade-II (TG-2). The minimum qualification for promotion is that the incumbent apart from qualifying the examination must be a High School. On 6.8.2008, appellant No. 3, Executive

Engineer, Electricity Distribution Division, Dakshinanchal Vidyut Vitran Nigam Limited, District Banda issued a show-cause notice directing him to produce his High School certificate. Pursuant thereto, he approached appellant No. 3 alongwith original mark sheet as well as certificates, However, appellant No. 3 did not examine the original mark sheet and again a notice was issued on 20.10.2008 calling upon the respondent to submit his mark sheet. Similar notice was issued on 5.9.2009. In response thereto, the respondent submitted a detailed reply on 3.10.2009 and due to the pendency of the enquiry, he was not given the benefit of "Sixth Pay Commission" hence he preferred Civil Misc. Writ Petition No. 75588 of 2010 praying that the pending enquiry be concluded and finalized which was dismissed vide judgment and order dated 4.1.2011. The judgment and order dated 4.1.2011 reads thus:

"Heard learned counsel for the parties.

It appears that some enquiry is going on against the petitioner with regard to authenticity of papers submitted by the petitioner and in pursuance thereto the petitioner has been asked to submit certain document vide orders dated 7.4.2010 and 23.9.2010.

It is stated by the petitioner that he has supplied all the documents but no decision is being taken.

If that is the case, the respondents may complete the said enquiry within six weeks from the date of submission of a certified copy of this order, provided the petitioner cooperates.

Subject to the aforesaid, this petition is dismissed."

3. In compliance of the aforesaid judgment and order dated 4.1.2011 of the High Court, inquiry was conducted against the respondent in which it was found by the Enquiry Officer that the original documents submitted by the respondent-employee do not tally with High School Certificate of the respondent. He was found guilty in the enquiry and vide order dated 14.5.2012 his services were terminated.

4. Aggrieved by the order dated 14.5.2014 the respondent preferred Civil Misc. Writ Petition No. 30714 of 2012, Aziz Ullah v. Dakshinanchal Vidyut Vitaran Nigam Limited and others, which was allowed vide judgment and order dated 24.7.2014, hence the instant appeal.

The impugned judgment and order of the Writ Court is assailed on the ground that the Writ Court has failed to consider that the respondent does not fulfill eligibility criteria for the post of T.G.-2 and has been promoted on the basis of forged certificate, hence he has caused financial loss to the Nigam; that the enquiry was held of which proper notice and opportunity was given to the respondent to put his defence and thereafter on the basis of proper scrutiny the order dated 14.5.2012 terminating his services was passed, hence in view of the law laid down by the Apex Court in the case of R. Vishwanatha Pillai Vs. State of

Kerala and Others, , issuance of fresh notice under the rules was not necessary as the genuineness of the certificate has already been examined by the Enquiry Officer.

5. It is also submitted that the Writ Court has quashed the order dated 14.5.2012 on the ground that no disciplinary enquiry as provided under rule 7 was initiated and no charge-sheet was served upon the delinquent employee, hence it has committed an error in law by not giving a liberty to the appellants to hold departmental enquiry in respect of the allegation of misconduct and take necessary action thereafter in accordance with law and as such the impugned judgment and order dated 24.7.2014 passed by the Writ Court is liable to be set aside.

6. Per contra, learned counsel for the respondent submits that only a show-cause notice was issued to the respondent to which he submitted his reply and thereafter the enquiry was conducted behind his back; that opportunity was afforded to the respondent to put his defence and the authority has imposed major penalty which is not permissible under the 1999 Rules; that the Writ Court has rightly allowed the writ petition, hence no interference is required by this Court. The Writ Court appreciated the arguments and the case laws thus:

"Enquiry commences with the issue of charge-sheet as held in the case of Union of India Vs. K.V. Jankiraman, etc. etc., , The Union of India (UOI) and Others Vs. Anil Kumar Sarkar, and The Government of Andhra Pradesh and Others Vs. Ch. Gandhi, ; Framing of the charge-sheet is the first step taken for holding enquiry into the allegations on the decision taken to initiate disciplinary proceedings. Service of charge-sheet on the Government servant follows decision to initiate disciplinary proceedings and it does not precede and coincide with that decision (vide Delhi Development Authority Vs. H.C. Khurana, . Once the enquiry was not initiated or contemplated or pending before the retirement, the same cannot be continued after retirement, unless there is a rule to that effect. The learned counsel for the respondents has failed to show any rule or circular as to whether disciplinary proceedings could be initiated after retirement and under what circumstances.

A Division Bench of this Court in Smt. Parmi Maurya v. State of U.P. and others, (2014) 2 U.P.L.B.E.C. 1060, held that the provisions of Rule 7 is mandatory and it is obligatory for the employer to frame charge/conduct disciplinary enquiry by applying the principles of natural justice and prove that certificates were fabricated, without adopting such procedure order passed terminating the delinquent employee is illegal. Paragraph 7 is as follows:

"7. On these facts, the learned Single Judge, in our view, was clearly in error in arrogating to the Court the task of determining whether the certificate and mark sheets submitted by the appellant were genuine or otherwise. This, with respect, was no part of the jurisdiction of the writ Court under Article 226 of the Constitution. When a substantive charge of misconduct is levied against an

employee of the State, the misconduct has to be proved in the course of a disciplinary inquiry. This is not one of those cases where a departmental inquiry was dispensed with or that the ground for dispensing with such an inquiry was made out. The U.P. Government Servants (Discipline and Appeal) Rules, 1999 lays down a detailed procedure in Rule 7 for imposing a major penalty. Admittedly, no procedure of that kind was followed since no disciplinary inquiry was convened or held."

In *Munni Devi Vs. State of U.P.*, , it was held that once an enquiry is initiated under Rule 7 it is mandated that the enquiry officer would conduct oral enquiry. It was held that oral enquiry would be mandatory before imposing major punishment. Paragraph 9 is as follows:

"9. The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of *Salahuddin Ansari v. State of U.P. and others*, 2008 (3) ESC 1667 and the Court clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment. This Court has said in paras 10 and 11 of the judgment as under:

"10. ----- Non holding of oral inquiry in such a case is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in *Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another*, , considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in *Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills and Others*, and *Laturi Singh v. U.P. Public Service Tribunal and others*, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

The Supreme Court in *Dev Prakash Tewari Vs. U.P. Cooperative Institutional Service Board*, was considering the case that as to whether disciplinary proceedings after retirement of an employee could be continued in absence of any rule to that effect. In paragraph 6 and 7 held as follows:

"6. While dealing with the above case, the earlier decision in *Bhagirathi Jena's* case (*supra*) was not brought to the notice of this Court and no contention was raised pertaining to the provisions under which the disciplinary proceeding was initiated and as such no ratio came to be laid down. In our view the said decision cannot help the respondents herein.

Once the appellant had retired from service on 31.3.2009, there was no authority vested with the respondents for continuing the disciplinary proceeding even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority it must be held that the enquiry

had lapsed and the appellant was entitled to get full retiral benefits.

7. The question has also been raised in the appeal with regard to arrears of salary and allowances payable to the appellant during the period of his dismissal and upto the date of reinstatement. Inasmuch as the inquiry had lapsed, it is, in our opinion, obvious that the appellant would have to get the balance of the emoluments payable to him."

The Full Bench judgment in case of State of Uttar Pradesh Vs. Jai Singh Dixit, , the words "inquiry" and "contemplated" was considered.

"34. A formal departmental inquiry is invariably preceded by an informal preliminary inquiry which itself can be in two phases. There can be a summary investigation to find out if the allegations made against the Government servant have any substance. Such investigation or inquiry is followed by a detailed preliminary or fact finding inquiry whereafter final decision is taken whether to initiate disciplinary proceeding. The first preliminary inquiry may be in the shape of secret inquiry and the other, of an open inquiry. In the alternative, when complaints containing serious allegations against a Government servant are received, the authority may peruse the records to satisfy itself if a more detailed preliminary inquiry be made.

37. Departmental inquiry is contemplated when on objective consideration of the material the appointing authority considers the case as one which would lead to a departmental, inquiry, irrespective of whether any preliminary inquiry, summary or detailed, has or has not been made or if made, is not complete. There can, therefore, be suspension pending inquiry even before a final decision is taken to initiate the disciplinary proceeding i.e., even before the framing of the charge and the communication thereof to the Government servant."

The Supreme Court in Mathura Prasad Vs. Union of India (UOI) and Others, , held that when an employee is sought to be deprived of his livelihood for alleged misconduct, the procedure laid down under the rules are required to be strictly complied with:

"When an employee, by reason of an alleged act of misconduct, is sought to be deprived of his livelihood, the procedure laid down under the sub-rules are required to be strictly followed: It is now well-settled that a judicial review would lie even if there is an error of law apparent on the face of the record. If statutory authority uses its power in the manner not provided for in the statute or passes an order without application of mind, judicial review would be maintainable. Even an error of fact, for sufficient reasons may attract the principles of judicial review."

The Division Bench of this Court in Dr. Subhash Chandra Gupta v. State of U.P. and others, 2012 (1) ESC 279 (All) (DB), while dealing with the provision of rule 7 and 9 of the Rules, held that the procedure for imposition of major penalty is mandatory and where the statute provides to do a thing in a particular manner

that thing has to be done in that manner. Paras 15 and 16 is as follows:

"15. It is well-settled that when the statute provides to do a thing in a particular manner that thing has to be done in that very manner. We are of the considered opinion that any punishment awarded on the basis of an enquiry not conducted in accordance with the enquiry rules meant for that very purposes is unsustainable in the eye of law. We are further of the view that the procedure prescribed under the inquiry rules for imposing major penalty is mandatory in nature and unless those procedures are followed, any out come inferred thereon will be of no avail unless the charges are so glaring and un-refutable which does not require any proof. The view taken by us find support from the judgment of the Apex Court in Mathura Prasad Vs. Union of India (UOI) and Others, , as well as by a Division bench of this Court in Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another, .

16. A Division Bench decision of this Court in the case of Salahuddin Ansari v. State of U.P. and others, 2008 (3) ESC 1667 (All) (DB), held that non holding of oral inquiry is a serious flaw which can vitiate the order of disciplinary proceedings including the order of punishment has observed as under:

"10. Non holding of oral inquiry in such a case, is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another, , considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills and Others, and Laturi Singh v. U.P. Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005."

7. After hearing learned counsel for the parties and on perusal of the impugned judgment of the Writ Court and the record it appears that the respondent had been working since 1971 and had passed his high school examination in 1990. Thereafter he appeared for the written examination for promotion to the next higher post (TG-II). On the basis of some complaint that the respondent's high school certificates were forged, an enquiry was initiated. At the best it could be said that it was a fact finding enquiry and on the basis of a fact finding enquiry the services of the respondent were terminated without following the procedure as prescribed under rule 7 of the Rules. The impugned order of termination was passed on 14.5.2012 and he had since superannuated on 31.7.2012.

8. The Writ Court after considering the following admitted facts has recorded the findings in the impugned judgment dated 24.7.2014 thus:

"The facts are not in dispute between the parties. It is admitted that no charge-sheet was issued to the petitioner as required under rule 7 for initiating

disciplinary proceedings for imposing major penalty. The enquiry had not commenced before the petitioner superannuated. The learned counsel for the respondents failed to point out any rule as to whether disciplinary proceedings could be initiated against the petitioner after retirement. Even otherwise, after retirement the petitioner cannot be imposed the penalty of termination as the employer/employee relationship no longer exists. There is no allegation of causing loss to the corporation that is to be recovered, hence no enquiry can be initiated against the petitioner after retirement. The impugned order of termination was passed on 14.5.2012 merely on a show-cause notice and two months thereafter i.e. on 31.7.2012 the petitioner retired on attaining the age of superannuation thus on the date of superannuation there was no enquiry pending or contemplated, and admittedly the procedure as contemplated under rule 7 of the Rules of 1999 was not followed and straightway the petitioner's services was terminated.

For the facts and circumstances stated herein above, the impugned order dated 14.5.2012 is quashed. The petitioner shall be entitled to post retirement benefits.

The writ petition is allowed with all consequential benefits. Legal expenses assessed as Rs. 15,000/-."

In view of the above, learned counsel for the appellants has failed to point out any rule as to whether disciplinary proceedings could be initiated against the delinquent employee after retirement. The order of termination was passed on 14.5.2012 merely on a show-cause notice and two months thereafter i.e. on 31.7.2012 he retired from the service after attaining the age of superannuation. It appears that on the date of superannuation there was no enquiry pending or contemplated against the respondent. The procedure as provided under rule 7 of the Rules, 1999 was not followed and straight way the services of the respondent were terminated. The Writ Court has rightly quashed the termination order dated 14.5.2012 directing the appellants to pay post retirement benefits to the respondents.

For the reasons stated above, the special appeal is dismissed. No order as to costs.