
(2012) 06 AHC CK 0063

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 9515 of 2002

Dr. Anup Khare

APPELLANT

Vs

Cantonment Board and Others

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Citation : (2012) 7 ADJ 1

Hon'ble Judges : Sunil Ambwani, J;Aditya Nath Mittal, J

Bench : Division Bench

Advocate : R.C. Katara, for the Appellant; S.S.C. and Subodh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Aditya Nath Mittal, J.—This writ petition has been filed by the petitioner for quashing the impugned charge-sheet dated 20.11.2001, the ex parte departmental enquiry and order of dismissal dated 28.1.2002. The case of the petitioner is that he was appointed as Resident Medical Officer (R.M.O.) in Cantt. General Hospital, Agra on temporary basis in the leave vacancy of Dr. Jai Hari Har Lal on 4.6.1983, and in compliance of the aforesaid appointment letter, the petitioner resumed duty on the post of R.M.O. in Cantt. General Hospital, Cantt., Agra. In view of the petitioner's academic qualifications, he was given exemption in age. The petitioner always performed his duties honestly, faithfully and diligently to the entire satisfaction of his superiors. The petitioner was absorbed on the post of R.M.O. in the Cantt. General Hospital, Agra after the retirement of Dr. Jai Hari Har Lal w.e.f. 1.1.1986 on permanent basis. The services of the petitioner are governed by the Cantonment Fund Servant Rules, 1937. As per the said rules, all appointments on supervisory posts were to be made by the Board and on non-supervisory posts by the Executive Officer. The post of R.M.O. comes within the definition of supervisory post. As per rule 6 of the service rule, the maximum period of probation expired on 1.1.1989, which was not extended, hence the petitioner stood automatically confirmed on the post of R.M.O. The

petitioner was also given higher pay scale of R.M.O. vide letter dated 29.5.1990. The petitioner was never awarded any major or minor punishment during 18 years of service in the Cantonment Board, Agra. Mr. Rajeev Srivastava, the CEO, Cantonment Board, Agra got annoyed with the petitioner as the petitioner did not submit to his illegal wishes and with a view to take revenge from the petitioner, the petitioner was declared as unconfirmed vide order dated 5.12.2001 without any notice and opportunity. The CEO also refused the medical leave of the petitioner from 20.11.2001 to 27.11.2001 and then from 12.12.2001 to onwards and directed the petitioner to appear before the Chief Medical Officer, Agra for medical check-up on 24.12.2001 and simultaneously instituted departmental proceedings. Mr. Rajeev Srivastava, CEO was neither the appointing authority nor the disciplinary authority of the petitioner but still issued a charge-sheet dated 20.11.2001, against which the petitioner submitted representations dated 10.12.2001 and 8.1.2002 before the Principal Director, Defense Lands and Ceiling, Central Command, Lucknow through proper channel which are still pending for disposal. The aforesaid representations further annoyed Mr. Rajeev Srivastava, CEO, Cantonment Board, Agra. Mr. P.K. Sharma, Joint CEO, Cantonment Board, Agra was appointed as Enquiry Officer, who was inferior in rank, status and subordinate to Mr. Rajeev Srivastava. The condition of the petitioner was critical w.e.f. 12.12.2001 and he was referred to Delhi at Sir Ganga Ram Hospital and was advised admission and rest. The Enquiry Officer fixed 24.12.2001 for departmental enquiry which was communicated to the petitioner on 22.12.2001 but the petitioner choose to go Delhi at Sir Ganga Ram Hospital as his condition was deteriorating. The petitioner's wife approached the Enquiry Officer to adjourn the hearing of the departmental enquiry which was not adjourned. An ex parte enquiry under the influence and pressure of Mr. Rajeev Srivastava, CEO was conducted. The Enquiry Officer did not examine any of the oral or documentary evidence and did not provide any opportunity to the petitioner to lead defence evidence. The petitioner was not supplied with the copy of the enquiry report and the copy of the impugned order dated 28.1.2002. The petitioner was dismissed from service vide order dated 28.1.2002 on the basis of ex parte enquiry report. The impugned orders as well as the acts of the respondents are illegal, arbitrary, without jurisdiction, unconstitutional, mala fide and void from very inception. Hence this writ petition.

2. In the counter-affidavit, it has been stated that the petitioner was never appointed as R.M.O. in Cantt. General Hospital, Agra. The post of R.M.O. is a supervisory post and is in the nature of head of the hospital. The senior most doctor of the Cantt. General Hospital in service of Cantonment Board can be appointed as R.M.O. by the Cantonment Board under prescribed rules. The petitioner was appointed as Medical Officer by his appointing authority i.e. the Cantonment Executive Officer under rule 7(1) of Cantonment Fund Servant Rules, 1937 for a period of three months w.e.f. 4.6.1983, on purely temporary basis against the leave vacancy of the regular medical officer Dr. Jai Hari Har Lai. It has been denied that the age exemption to the petitioner was granted on the

basis of his academic qualifications. The petitioner has remained on long stretches of leave on various occasions during his service period due to which the medical facilities to the general public were adversely affected. The time bound financial benefits were granted to the petitioner. The petitioner was never absorbed on the post of R.M.O. in Cantonment General Hospital. The petitioner was appointed on leave vacancy on temporary basis so there was no question of probation or its extension. The allegations made against Mr. Rajeev Srivastava are mala fide. The CEO is the appointing authority of the petitioner. The leave application of the petitioner was not allowed due to his frequent absence and his entitlement. The petitioner was often found to be absent during duty hours as mentioned in the charge-sheet. The petitioner was required to appear before the Chief Medical Officer, Agra for second medical opinion which was considered essential by the CEO/Controlling authority under the leave rules. The petitioner was found to be running a personal clinic and engaged in private practice during the so called illness for which he had submitted medical certificate for leave. The petitioner continued to attend the patients at his private clinic at his residence at Lauries Hotel, M.G. Road, Agra and also performed surgical operation in several Nursing homes in Agra during his stated medical illness. The petitioner's services were temporary in nature hence the petitioner was not entitled to the leave claimed by him. The petitioner has not participated in the disciplinary proceedings and deliberately avoided thereby attempting to obstruct the disciplinary proceedings. The petitioner was afforded opportunities to submit his reply against the memorandum of charges. The petitioner was never admitted to Sir Ganga Ram Hospital for his treatment as he attended private patients on the same date at Agra and a copy of the prescription issued by the petitioner from his private clinic on 24.12.2001 has been filed as Annexure C.A.-7. The petitioner never sought adjournment of disciplinary proceedings from the Enquiry Authority nor submitted the medical certificate to the Enquiry Officer. The petitioner was given another opportunity by the Enquiry Officer but he again failed to appear before the Enquiry Officer, hence the Enquiry Officer concluded the enquiry on 24.12.2001 and submitted its report to the Disciplinary Authority.

3. The Disciplinary Authority forwarded the enquiry report to petitioner for his comments on 29.12.2001. The petitioner did not submit his comment and thereafter on 28.1.2002 the Disciplinary Authority issued order in the matter. The Enquiry Authority has conducted the enquiry in accordance with the rule and due opportunities of hearing and submissions of defence evidence were provided to the petitioner. The contention of the petitioner and the medical certificate submitted by him are false, concocted, misleading and an act of fraud. The petitioner is not entitled to any relief. The writ petition is not maintainable in view of the fact that the petitioner has failed to exhaust the alternative remedy available to him under the law. The writ petition is liable to be dismissed.

4. Heard Learned Counsel for the parties at length. Learned Counsel for the petitioner has raised the following main contentions :

(i) That the petitioner was R.M.O. which is a supervisory post and thus the CEO, Cantonment Board was not the appointing authority nor the competent authority for holding the disciplinary proceedings.

(ii) The petitioner was not afforded proper opportunity of hearing.

5. It is not disputed that as per provisions of rule 7(1), all appointments on supervisory posts shall be made by the Board and on non-supervisory posts by the Executive Officer. It is also not disputed that the post of medical officer in Cantonment Board is a non-supervisory post and the post of R.M.O. is a supervisory post. As per provisions of rule 2(ff) of the Cantonment Fund Servants Rule 1937, "Supervisory Post" means any appointment under a Board which has been declared as a supervisory post by the Central Government or such Authority as may be authorized by it in this behalf. Annexure-D of the service rule provides details of the supervisory post. These are R.M.O., Office Superintendent, Accountant, Revenue Superintendent, Assistant Engineer, Senatory Superintendent and Head Master (Primary/JHS).

6. The contention of the petitioner is that he was appointed as R.M.O. while this fact has been denied in the counter-affidavit. By appointment letter dated 4th June, 1983 the petitioner was offered an appointment of male doctor in Cantt. General Hospital by the Cantt. Executive Officer, Agra in the pay scale of Rs. 850-1700 on a purely temporary basis and in leave vacancy of Dr. Jai Hari Har Lal for a maximum period of 3 months or earlier in the event of joining by the permanent doctor. The appointment letter further mentions that the services can be terminated at any time on giving 7 days notice without assigning any reason there for. The petitioner accepting the offer, resumed his duties. In letter dated 19.8.1983, necessary relaxation of age limit in respect of Dr. Anup Khare under the provisions of rule 5(2) of Cantonment Fund Servants Rule 1937 was requested in view of the urgency of Male Doctor which was granted vide letter dated 9.1.1984 (Annexure C.A.-2). This letter do not show that the relaxation was granted in view of his higher qualifications or experience. The petitioner has not filed any such appointment letter by which he was appointed as R.M.O. The services of the petitioner always remained on temporary basis, for which he was also informed vide letter dated 5.12.2001. It is appears that the petitioner was appointed as Medical Officer purely on a temporary basis and was not appointed as R.M.O. as contended by him. He was also not confirmed on the post of Medical Officer. The grant of financial benefits do not ipso facto entitle any person to hold the promotional post. Undisputedly the post of R.M.O. is a supervisory and promotional post. Thus the contention of the petitioner is without any basis that he was appointed as R.M.O.

7. The petitioner was appointed on the non-supervisory post by the C.E.O., thus in view of Rule 7(1) of Cantonment Fund Servants Rule 1937, the appointing authority as well as the disciplinary authority was the Cantt. Executive Officer. The Cantt. Executive Officer was competent to hold enquiry himself or through some officer subordinate to him, provided that such subordinate officer should

not be inferior in rank with the delinquent officer. In this case the enquiry was conducted by the Jt CEO (Mr. P.K. Sharma), who was not inferior in rank to the petitioner. Thus, we do not find any merit in the arguments of Learned Counsel for the petitioner that the CEO was not the appointing authority/disciplinary authority of the petitioner.

8. The next contention of Learned Counsel for the petitioner is that the petitioner was not afforded proper opportunity of hearing while conducting the disciplinary proceedings. The disciplinary proceedings were initiated mainly on the charge that Dr. Anup Khare was asked vide letter dated 30.10.2001 to start evening O.P.D. in Cantt. General Hospital, Agra from 4:00 p.m. to 6:00 p.m. as per decision of the Cantonment Board. Dr. Anup Khare showed his inability to come in the evening hours on the ground that he had to stay at his residence alongwith his parents. Apart from it there were nine other charges regarding deliberate and intentional disobedience to comply with the orders issued to him by Cantt. Executive Officer; the refusal letter to attend the evening O.P.D. was not routed through proper channel; the petitioner used discourteous and offensive language on telephone. The charged official had challenged his superior authority and had not replying four letters calling for his explanation within stipulated time.

9. The enquiry report has been filed alongwith counter-affidavit which shows that the petitioner was directed to appear before the Enquiry Authority on 21.12.2001, vide letter dated 18.12.2001. At the first instance, the charged official refused to receive the letter, inter alia, stating that the same be sent by post. On 20.12.2001, the same letter was pasted at the residence of the charged official. The charged official still failed to appear before the Enquiry Authority on 21.12.2001. The intimation of his non-appearance was also not received by the Enquiry Officer. One more opportunity was granted to the charged official vide letter dated 21.12.2001 and 24.12.2001 was fixed for the enquiry. In the said letter dated 21.12.2001, it was clearly mentioned that if the charged official failed to appear before the Enquiry Officer on 24.12.2001, then it will be presumed that the charged official has availed the opportunity of defence and presenting his case. The charged official (the petitioner) again refused to receive the same which was also pasted at his residence. The charged official did not turn up before the Enquiry Authority on 24.12.2001. Accordingly, the disciplinary proceedings proceeded ex parte and were concluded on the same day.

10. Learned Counsel for the petitioner has contended that the petitioner could not attend the enquiry because he was seriously ill. In support of this contention, Learned Counsel for the petitioner has relied upon the O.P.D. slip of Sir Ganga Ram Hospital, New Delhi, according to which the petitioner was advised for admission in hospital, because of the critical mental and physical position. A perusal of the O.P.D. slip No. 088390 dated 24.12.2001 (paper No. 76 of the rejoinder affidavit against counter-affidavit) shows that there was a complaint of pain in left knee and left ankle. Admittedly, the petitioner is himself a qualified

doctor having degree of Master of Surgery in Orthopedic. We failed to understand that with master degree in Orthopedic, why complainant could not himself diagnose his complaint of pain in left knee and left ankle and for which he had to go upto New Delhi. It is also relevant to mention that in another medical certificate issued by Dr. K.P. Sarabhai, he has mentioned about the complaint of UTI. In our opinion, these were not such diseases which could have prevented the petitioner to appear before the Enquiry Officer. More over, as per the prescription slip of Sir Ganga Ram Hospital, the petitioner was advised admission in hospital. He never got himself admitted. Learned Counsel for the respondent No. 3 has submitted that even on 24.12.2001 the petitioner was rendering medical advise to his patients at his private clinic, and had issued medical certificate to Virendra Kumar Vashishta which has been filed as C.A.-7. It has also been argued that during the period he claimed illness, he had issued various medical certificates in respect of working employees of Cantt. Board from the Cantt. General Hospital, Agra. On the perusal of the record, we have come to the conclusion that the ground of his so called illness was not genuine. He has mentioned of his illness just to avoid and delay the disciplinary proceedings. We also find substance in the argument of Learned Counsel for the respondent No. 3 that petitioner never remained serious about his duties at the Cantt. Board as he was engaged in private practice at various hospitals at Agra. A supplementary counter-affidavit on behalf of respondents dated 8.5.2012 has been filed alongwith some photographs which shows that Dr. Anup Khare was running a Joint Replacement Clinic at Lauries Hotel, Pratap Pura, Agra as well as his name finds place on the list of doctors of Sri Ram Hospital, Mahatma Gandhi Marg, Agra; Dr. S.C. Agarwal Agra Medical Cardiac Research Centre, and Kamayani Hospital, Agra.

11. Learned Counsel for the petitioner has relied upon the judgment in the case of State of U.P. and Others Vs. Saroj Kumar Sinha, , in which the Hon"ble Apex Court, examining Rule 7(5) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 has held that the Disciplinary Authority is duty bound to make available all relevant documents which are sought to be relied upon against the Government servant in proof of charges. It has been further held that when the respondents had failed to submit the explanation to the charge-sheet it was incumbent upon the Enquiry Officer to fix a date for his appearance in the enquiry. It is only in a case when the Government servant despite of notice, on the date fixed failed to appear then the Enquiry Officer can proceed with the enquiry ex parte.

12. In the present case, the memorandum dated 20.11.2001 was issued to the petitioner and the petitioner was required to submit his written statement of his defence within 10 days. It was also mentioned in the said memorandum that if he does not submit his written statement of defence or does not appear before the Enquiry Authority, the Enquiry Authority may hold the enquiry against him ex parte. Alongwith the memorandum, a statement of articles of charges, statement of imputation of the misconduct in support of each charge, list of documents and

list of witnesses was also enclosed. The petitioner instead of participating in the disciplinary proceedings, proceeded on unauthorised medical leave on the flimsy grounds which was duly rejected by the respondents. It is also relevant to mention that the petitioner was also directed to appear before the Chief Medical Officer, Agra for second opinion, but he did not appear before the Chief Medical Officer, Agra. The conclusions of the enquiry report also shows that when the charged official failed to appear before the Enquiry Authority on 21.12.2001 then one more opportunity was offered to him to appear on 24.12.2001. In this way, it cannot be said that the petitioner was not given opportunity by the Enquiry Officer to defend himself. The petitioner does not get any benefit from the above citation.

13. Learned Counsel for the petitioner has relied upon the decision in the case of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and others, (2001) 1 SCC 182, in which the Hon"ble Apex Court has held that : "While it is true that in a departmental proceeding, the disciplinary authority is the sole judge of facts and the High Court may not interfere with the factual findings but the availability of judicial review even in the case of departmental proceeding cannot be doubted. Judicial review of administrative action is feasible and same has its application to its fullest extent in even departmental proceedings where it is found that the recorded findings are based on no evidence or the findings are totally perverse or legally untenable. The adequacy or inadequacy of evidence is not permitted but in the event of there being a finding which otherwise shocks the judicial conscience of the Court, it is a well-nigh impossibility to decry availability of judicial review at the instance of an affected person. The observations as above however do find some support from the decision of this Court in the case of Apparel Export Promotion Council Vs. A.K. Chopra, .

It is a fundamental requirement of law that the doctrine of natural justice be complied with and the same has, as a matter of fact, turned out to be an integral part of administrative jurisprudence of this country. The judicial process itself embraces a fair and reasonable opportunity to defend though, however, we may hasten to add that the same is dependant upon the facts and circumstances of each individual case. The facts in the matter under consideration is singularly singular. The entire chain of events smacks of some personal clash and adaptation of a method unknown to law in hottest of haste: this is however, apart from, the issue of bias which would be presently dealt with hereinafter. It is on this context, the observations of this Court in the case of Sayeedur Rehman Vs. The State of Bihar and Others, seem to be rather apposite. this Court observed: (SCC p. 338, para 11)

The omission of express requirement of fair hearing in the rules or other source of power claimed for reconsidering the order, dated April 22, 1960, is supplied by the rule of justice which is considered as an integral part of our judicial process which also governs quasi-judicial authorities when deciding controversial points affecting rights of parties.

14. We find that adequate opportunity of hearing was afforded to the petitioner which he did not avail. In these circumstances, the petitioner cannot say that he was not given opportunity of hearing before the Enquiry Officer, rather the conduct of the petitioner shows that he avoided to participate in disciplinary proceedings on one pretext or the other. The petitioner was not in such a condition which deprived him to attend the disciplinary proceedings. Even then the Enquiry Officer has considered the evidence at length and has drawn his conclusions based on the documents. In our opinion the findings cannot be said to be based on no evidence, or are such which are totally perverse or legally untenable.

15. The contention of Learned Counsel for the respondents carries weight that the petitioner was not interested to get this petition decided at an early date. He got this petition dismissed in default on two occasions. He delayed the filing of restoration application as he was engaged in private practice. The petitioner is to retire in July, 2012, and thus the haste to argue the matter just to get financial benefits. In the alternate, it is submitted that the petitioner is not entitled for any financial benefits in view of *Union of India v. B.M. Jha*, AIR 2007 SC (Supp) 1396. In para 5, it has been held that :

We have heard Learned Counsel for the parties. It was argued by Learned Counsel for the respondent that when a retrospective promotion is given to an incumbent normally he is entitled to all benefits flowing there from. However, this Court in the case of *State of Haryana and Others Vs. O.P. Gupta, etc.*, and followed in the case of *A.K. Soumini Vs. State Bank of Travancore and Another*, , has taken the view that even in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post. These decisions relied on the principle of no work no pay. The learned Division Bench in the impugned judgment has placed reliance on the case of *State of Andhra Pradesh v. K.V.L. Narasimha Rao and others*, (1999) 3 SCC 205. In our view, the High Court did not examine that case in detail. In fact, in the said judgment the view taken by the High Court of grant of salary was set aside by this Court. Therefore, we are of the view that in the light of the consistent view taken by this Court in the abovementioned cases, arrears of salary cannot be granted to the respondent in view of the principle of no work no pay in case of retrospective promotion. Consequently, we allow this appeal and set aside the impugned order of the High Court dated 17.5.2000 passed by the Division Bench of the High Court as also the order dated 11.1.2000 passed by the Central Administrative Tribunal, Principle Bench.

16. Admittedly the petitioner has not rendered any kind of service after the order of dismissal, so no pecuniary benefits are available to him.

17. It is further been argued that impugned orders are the result of malice of the then CEO Mr. Rajeev Srivastava towards the petitioner. Nothing has been shown to draw such presumption.

18. Learned Counsel for the respondents also submitted that the petitioner has not availed the alternative remedy to file appeal before the Board within a period of 30 days as provided by Rule 13 of the Cantonment Funds Service Rule, 1937. The petitioner in this case has been awarded major penalty i.e. of dismissal from service. Rule 13 provides as under :

13. (1) Any servant on whom any of the penalties specified in rule 11 has been imposed by the Executive Officer, shall be entitled to appeal to the Board within thirty days of delivery of the document showing the grounds on which the penalty was imposed and a copy of the decision of the Board thereon shall be delivered to him personally or by registered post.

(2) Any such servant who has been reduced, removed or dismissed shall be entitled, within thirty days of the date of delivery of the copy of the decision of the Board rejecting his appeal, to submit a further appeal to the Officer Commanding-in-Chief, the Command whose decision shall be final.

19. Rule 13 mentioned above is clear which provides right to appeal to Board as well as further appeal to Officer Commanding-in-Chief, the Command. Admittedly, the petitioner has not availed any of the opportunities provided under Rule 13 of the Cantonment Funds Servant Rule, 1937.

20. We are conscious that a dismissal order has serious consequences and should be passed only after complying with the rules of natural justice. For the reasons mentioned above, we do not find any non-compliance with the rules of natural justice. We find that ample opportunities were given to the petitioner to explain his conduct and to appear before the Enquiry Officer which the petitioner did not avail. The petitioner also has not filed any appeal as provided under Rule 13 of the Cantonment Funds Servant Rule 1937. The petition is devoid of any merit and is accordingly dismissed.