

(2004) 04 AHC CK 0213

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8757 of 1998

Dr. Dinesh Kumar Kesarwani

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 06-04-2004

Acts Referred:

Central Civil Services (Classification, Control and Appeal) Rules, 1965 — Rule 12(2), 12(3)

Constitution of India, 1950 — Article 12, 311(2)

Citation : (2004) 5 AWC 3919

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : J.N. Tiwari, S.N. Tripathi and Rollie Kauser, for the Appellant; U.N. Sharma, S.S.C. and Subodh Kumar, Addl. S.C., for the Respondent

Final Decision : Allowed

Judgement

R.B. Misra, J.

In this petition, the petitioner has prayed for issuance of writ of certiorari for quashing the order dated 4.2.97 (Annexure-6 to the writ petition) awarding the punishment and order dated 20.11.97 (Annexure-11 to the writ petition) of the Executive Committee of the Allahabad. Museum " Society, Allahabad dismissing the appeal of the petitioner with further prayer for issuance of writ of mandamus directing she respondents to pay the petitioner all pay and allowances of the suspension period alongwith increments and interest.

1. Heard Sri J. N Tiwari learned Senior Advocate with Sri S.N. Tripathi for and on behalf of the petitioner and Sri Subodh Kumar learned Additional Standing counsel for Union of India/the respondents.

2. The facts necessary for adjudication of writ petition are that Allahabad Museum Society (hereinafter referred as Society) is a registered Society under the Societies Registration Act, 1860, fully owned, controlled and funded by the

Government of India as well as supervised under the control of Ministry of Human Resources and as such is an instrumentality of the "State" within the meaning of Article 12 of the Constitution of India. The Director of Societies appointed with the approval of the Government of India and the "Financial Advisor" in the department of Culture, Ministry of Human Resource Development is the "Financial Advisor" of the respondent society. The service conditions of the employees are governed by the Rules framed under Bye-laws of the "Society" and where the rules or the bye-laws of "Society" are silent the provisions of Central Civil Services (Classification Control & Appeals) Rules are to be made applicable.

3. The petitioner was appointed as "Technical-Assistant" in "Society" on 15.4.1988 in the pay scale of Rs. 1400-2300 subsequently regularised in service on 20.9.1992 (w.e.f. 15.4.1988) and was confirmed on 6.1.1994. It appears one Dr. S.K. Sharma had appointed as "Curatorial Associate of Education" with effect from 9.8.1988 i.e. from the date of his initial appointment in the pay scale of Rs. 1640-2900, whereas, the petitioner was given pay scale of Rs. 1640-2900 from 24.9.1992. The petitioner made a representation inter alia stating that he is also entitled to be placed in the said pay scale of Rs. 1640-2900 with effect from 24.9.1992. According to the petitioner, the respondent No. 4 (i.e. Sri U.S. Tiwari, Director of Society) was annoyed with the petitioner for reasons best known to him but on persuasion by petitioner for not resorting to Court for his grievance unlike others aspirants the up-gradation of petitioner in the said scale by the order dated 28.4.1994 (Annexure-1 to the writ petition) was considered, however other claimants were pursuing their claim through courts. 1 he respondents No. 4 in its order dated 28/29.4.94 has also indirectly indicated warning to the petitioner to revert the petitioner to the original pay scale, however the said letter was subsequently withdrawn on 15 1991 (Annexure-2 to the writ petition). According to the petitioner when on 1. 8.1995 the petitioner went to the respondent No. 1 for obtaining the leave and referred claim for the post of "Keeper" he noticed that Dr. S.K. Sharma was sitting with the Director and on the issue of leave, the Director, made absurd remarks over the petitioner and used unparliamentary language and on protest the petitioner was physically assaulted by the Director. The petitioner lodged First Information Report which was registered as Crime Case No. 640-A/95 at Police Station, Colonelganj, Allahabad The petitioner got himself examined medically by the Medical Officer, M.L.N. Medical College, Allahabad on 4.8.1995 at 3.40 p.m. when he was advised for one week rest and later on 10.8.1994 the petitioner informed the entire incidence to Finance & Accounts Officer, Allahabad Museum Society, Allahabad. It appears that in order to pre-empt/ peshbandi, the respondent No. 4 had also made a report to the Chairman/Finance-cum- Accounts Officer alleging that the petitioner has abused him also and had physically assaulted him as well as Dr. S.K. Sharma on 4.8.1994 and the petitioner was placed under suspension by order 4/8/1995, and suspension order was served in the petitioner on 13.10.1995 (Annexure-4) alongwith a charge sheet dated 9.9.1995 (enclosed as

Annexure-5 to the writ petition). During suspension of petitioner an advertisement was published in the "Pioneer" dated 30.8.95 for recruitment to the post of Keeper in the pay scale of Rs. 3000-4500. The petitioner challenged the said recruitment by way of writ petition No. 34300 of 1995 and this court by its order dated 29.11.1995 was pleased to restrain the respondent No. 4 from participating in the selection committee and further directed the Director, Banaras Hindu University Museum, Varanasi to be member of the Selection Committee in place of Sri U.S. Tiwari one of the respondents named herein Prof. Amar Singh as Chairman of the "Society" and Dr. Ayodhya Prasad Pandey to hold inquiry against the petitioner.

4. The charge sheet dated 9.9.1995 was issued by Sri U.S. Tiwari the respondent No. 4 himself without any documents and without copy of F.I.R. or medical report or statements of any witnesses and despite the letter dated 18.10.1995 of the petitioner, no documents were furnished to the petitioner. Inspection of these documents were not even allowed and the inquiry was conducted behind the back of the petitioner, where Sri U.S. Tiwari, the respondent No. 4 and Dr. S.K. Sharma were examined ignoring Dr. R.K. Verma admittedly present at the time of incidence. The Inquiry Officer submitted the report without furnishing the same to the petitioner and an order dated 4.2.1997 (Annexure-6 to the writ petition) was passed refusing the payment to the petitioner for a period of two years with a further direction not to make any payment and allowance during the suspension period of the petitioner and stopping the increment also. By the impugned order, the pay of the petitioner was reduced by two stages from Rs. 1,760/- to Rs. 1640/- in the time scale of pay of Rs. 1640-60-2-600-EB-75-2900 for a period of two years w.e.f. 4.2.1997 with further indication that the petitioner was not to earn increments of pay during the period of reduction and on expiry of this period, the reduction was not to be given effect of postponing his future increments of pay, with further remarks for not paying allowances to the petitioner during the period of suspension except the subsistence allowance already allowed to the petitioner and the suspension period was not to be treated as a duty for any purpose except pension. On the specific demand of the petitioner the inquiry report was given to him on 8.2.1997 whereupon, the petitioner could file an appeal before the Chairman of Society which too was dismissed on 20.11.1997 (Annexure-10 to the writ petition) conveyed to the petitioner on 11.12.1997 (Annexure-11 to the writ petition). These two orders dated 4.2.1997 and 20.11.1997 are challenged in the present writ petition.

5. The relevant provisions of Service Bye laws applicable to the society are provided as below:-

(i) Rule 51 of the Service Bye laws provides the procedure ; for imposing penalties. According to bye law 51(I) no order imposing any penalty on an employee shall be passed except after the employee is informed in writing of the proposal to take action against him and of the allegations on which it is proposed to take action and giving an opportunity to make such representation he may

with to make and (b) such representation, if any, is taken into consideration by the authority imposing the penalty.

(ii) Rule 51 (ii) of the Service Bye laws further provides that in the case of a major penalty (those mentioned in (1) and (ii) of Bye law 49 (B) the employee shall have the right to ask for a personal hearing/oral inquiry and no order imposing such a penalty shall be passed except after the desired enquiry has been held and an opportunity has been given to the employee to make any representation against the penalty proposed to be awarded on the light of the findings of the Inquiry Officer.

6. According to the petitioner he was not given any opportunity to make any representation in terms of Rule 51(i) and 51(ii) of the Service Bye Laws. In para 35 of the writ petition it was specifically asserted by the petitioner that the Director Sri U.S. Tiwari, who was witness and complainant remained present throughout inquiry proceedings inside the room alongwith the Inquiry Officer, when ever inquiry was held. He was not only present but he also used to interfere in the examination of witnesses and got their statements amended from time to time. His presence with inquiry officer caused great prejudice to the case of the petitioner and the inquiry officer could not conduct inquiry fairly and properly.

7. In para 36 it was stated that the petitioner objected the presence of Sri U.S. Tiwari during the course of inquiry proceedings but the inquiry officer, without passing any order on the request of the petitioner, permitted Sri U.S. Tiwari to remain present in the inquiry proceedings throughout.

8. In para 38 it was asserted that the report of the inquiry officer was not given to the petitioner before awarding punishment to him by the Chairman, which is against the principles of natural justice and the service Bye-laws.

9. In para 39 it was asserted that the witnesses were examined by the Inquiry Officer in presence of the petitioner. At the time of recording examination in chief of the two witnesses namely Sri U.S. Tiwari and Dr. S.K. Sharma, the petitioner was not allowed to enter the room where inquiry was being held and was directed to remain outside. The petitioner apprehends that examination in-chief was prepared by the Inquiry Officer in consultation with complainant, who was present inside the room

10. According to the petitioner the charge sheet did not company documents namely complaint of Sri U.S. Tiwari or copy of F.I.R etc. The procedure adopted by Inquiry officer was wholly illegal and against the principles of natural justice as inquiry officer had recorded statements of fitnesses inside room behind the back of the petitioner where Sri U.S. Tiwari was present and petitioner was made to sit out side room. As statements were not recorded in the presence of petitioner nor he signed those documents and the copies of the recorded statements were given to the petitioner only just few minutes before, on the date fixed for cross-examination due to which petitioner could not effectively, cross

examine the witnesses, for this purpose the petitioner refers and relies upon the case of Radhey Shyam Pandey 2001(2) U.P.L.E.B.C. 1676 at page 1683 (paras 19 and 21) and also case of Kashinath Dikshita Vs. Union of India (UOI) and Others,

11. The participation of Director/U.S. Tiwari/ the Respondent No. 4 in the inquiry was unwarranted as Sri U.S. Tiwari was highly biased and had influenced the inquiry proceedings throughout as the enquiry proceedings are vitiated.

12. Sri U.S. Tiwari himself issued the charge sheet though he was complainant, got the statements recorded by inquiry throughout. The order of punishment was passed with approval of that Executive Committee wherein Sri U.S. Tiwari was himself member being Secretary of "Society". The appeal of the petitioner was also dismissed by the Executive Committee of which Sri U.S. Tiwari was member. Thus it was Sri U.S. Tiwari, who was central figure at all stages.

13. The petitioner in reference to the decision of the Supreme Court (Constitution Bench) in A.K. Kraipak and Others Vs. Union of India (UOI) and Others, has submitted that the proceeding, in which an interested person participated in decision making shall be vitiated in law and cannot be legally sustained. Similar view was also taken in G.N. Nayak Vs. Goa University and Others, , so far as the departmental proceedings are concerned. The Supreme Court lastly considered the case of A.K. Kraipak (Supra) in the case of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors. 2001 (1) S.C.C. 182 where the principles of natural justice is applicable to the departmental inquiries and proceedings suffering from bias was held to be void. The test to determine bias was indicated as below:

"The doctrine of natural justice is not only to secure justice but to prevent miscarriage of justice. In Baldwin case the doctrine was held to be incapable of exact definition but what a reasonable man would regard as a fair procedure in particular circumstances. A question arises as to who is a reasonable man. In India, a reasonable man cannot but be a common man similarly placed."

A.K. Kraipak (Supra) referred and relied on Ridge v. Baldwin 1964 AC 40 : (1963) 2 All ER 66 (HL).

Although over the years there has been a steady refinement as regards the doctrine of principles of natural justice but no attempt has been made and, in fact, cannot be made, to define the doctrine in a specific manner or method. Strait Jacket formula cannot be made applicable but compliance with the doctrine is solely dependent upon the facts and circumstances of each case. The totality of the situation ought to be taken note of and if on examination of such totality, it comes to light that the executive action suffers from the vice of non-compliance with the doctrine, the law courts ought to set right the wrong inflicted upon the person concerned and to do so would be a plain exercise of judicial power. As a matter of fact the doctrine is now termed as a synonym of fairness in the concept of justice and stands as the most accepted methodology of a

governmental action. (para 2).

"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. The judicial process itself embraces a fair and reasonable opportunity to depend though the same is dependent upon the facts and circumstances of each individual case. The facts in the present matter under consideration are singularly singular. The entire chain of events smacks of some personal clash and adaptation of a method unknown to law in hottest of haste."

"The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn there from in the event " however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained: If on the other hand, the allegations, pertaining to bias is rather fanciful and otherwise to avoid a particular court, Tribunal or Authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence in that regard the Locabail case was rightly decided (Para 35)."

14. According to the petitioner, after the order of punishment served, the petitioner by his letter dated 4.2.97 requested for copy of Inquiry report, which was given to the petitioner on 8.2.97 but without medical report.

15. According to the petitioner appeal preferred against the punishment order too was placed before the same "Executive Committee" of which Sri U.S. Tiwari, the respondent was a member and the same appears to have been dismissed on 11.12.1997 by the same Executive Committee, which had passed order of punishment dated 4.2.97.

16. According to the petitioner the disciplinary authority of the petitioner is director, whereas, appellate authority is the Chairman but the petitioner was awarded punishment by the Executive Committee (Annexure-6) and appeal of the petitioner filed against the said punishment was also disposed off by the same Executive Committee (Annexure-11 to the writ petition). Thus the petitioner was deprived of right of appeal. Since Executive Committee has passed order of punishment, whereas it could not hear appeal, as the same was liable to be heard by the Chairman, as specified I"M Rule, and such appellate authority specified alone could hear the appeal. An authority which has passed order of punishment cannot hear appeal against its own order. This court (D.B.) in writ petition No. 2201 of 1977 (J.J. Roy v. UOI and Ors. in its judgement dated 25.4.1979 has considered identical issue and has observed :-

"...To hold that the President of the Institute as an appellate authority could also impose penalty of compulsory retirement, would be to change the statutory provisions of Rule 12(2) (b) and Rule 12(3)(b). This is obviously not permissible in view of the aforesaid pronouncement of the Supreme Court as well as the

subsequent decisions of their Lordships of the Supreme Court and of this court vide *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, ; *HR Sugar Factory (P) Ltd. Nekpur and Ors. v. State of U.P. and Ors.* 1979 ALJ 768. The aforesaid principle has also been applied in service matters by the Punjab and Haryana High. Court in two decisions reported in 1968 Service Law Reports, 650 and 1968 Service Law Reports, 798 as well, as by a Bench of this Court in the case of *Nanak Saran Srivastava v. State of U.P.*, reported in 1971 Service Law Reports Vol.-1 page 168, in which case the petitioner had been compulsorily retired in exercise of the powers conferred by the Chairman of the Legislative Assembly, whereas according to the findings recorded, a Secretary of the Legislative Assembly was the Appointing Authority of the petitioner. It was held that since a notice compulsorily retiring a government servant could be issued only by the appointing authority, the notice issued by the Chairman of the Legislative Assembly was null and void even though the Chairman of the Legislative Assembly was a functionary, superior in rank to the Secretary of the Legislative Assembly."

...Following the above decisions, we hold that even though the President of the Institute was an appellate authority, it had no power to pass an order compulsorily retiring the petitioner and that such an order could be passed legally only by the Registrar of the Institute, who was the named authority."... The impugned order is completely null and void and is liable to be quashed on that ground."

17. According to the petitioner, by not giving the second show cause notice to the petitioner the whole proceedings are vitiated in reference to the "following decisions:-

- (a) *State of Gujarat Vs. R.G. Teredesai and Another*,
- (b) *State of Maharashtra Vs. Bhaishankar Avalram Joshi and Another*,
- (c) *Bachhittar Singh Vs. The State of Punjab*,
- (d) *State of Mysore Vs. K. Manche Gowda*,

18. According to the petitioner more than one punishment have been awarded i.e. (1) reduction of two stage lower in time scale (2) stoppage of two future increments and (3) forfeiture of pay and allowances of the period, during which the petitioner remained under suspension, and such punishments amount to the double punishment for the same cause and for the same fault, more so, the punishments are highly excessive in view of the trivial alleged charges.

19. In para 25 of the counter affidavit it has simply been indicated that the contents of para Nos. 28 to 32 of writ petition are argumentative in nature were to be replied during arguments. No response however at all. was given in response to para 35 of the writ petition even at the time of arguments whereas specific allegations were made against Sri U.S. Tiwari.

In para 28 of the counter affidavit the contents of para 36 of writ petition were stated to be incorrect and denied with a further indication that the respondent No. 4 Sri U.S. Tiwari was present only when his presence was necessary to conduct inquiry.

20. In reference to the reply of the contents of para 38 and 39 of the writ petition, the Director/respondent No. 4/Sri U.S. Tiwari in para 30 of his reply has submitted as an after thought at belated stage before this Court, during the course of final hearing of this petition that whenever the statement of witnesses were recorded the petitioner never raised such objection as mentioned by him in para under reply. Such stand of petitioner is itself in derogation to the averments made in para 36 of the writ petition where the petitioner has in a very unequivocal terms has indicated that the petitioner objected to the presence of Sri U.S. Tiwari during the inquiry proceedings but the inquiry officer without taking any heed of the request of the petitioner had throughout permitted Sri Tiwari to remain present during the inquiry proceedings.

21. According the averments in para 8 of the supplementary rejoinder affidavit of petitioner Sri U.S. Tiwari/ the respondent No. 4, has even earlier done similar acts of exercising his influence as noted in the case of Arun Kumar v. Nagar Nigam, Allahabad in writ petition No. 19296 of 1986 (Contempt No. 991/90 and Ex. 1/91) and this Court has observed thus :-

"The Director, Allahabad Museum within C.A. Park, has taken the liberty to address demiofficial letter AMS/Dir/95-96637 dated 19.1.1996 (Envelope dt. 21.1.96) delivered at his residence on 23.1.96. .The contents of the letter mention certain aspects of the merits of the case, which the Director of the Museum Mr. U.S. Tiwari always had the liberty to submit at Bar of the court. The want expressed its reservation that a person who otherwise has the liberty to submit at the Bar of the court whose to address the judge by writing letter to the court. The C.S.C. informs the court that he had advised the official that what he had done is incorrect and against all norms and that if he has any submission to make he may do so at the Bar of the court, as he is already under notice to submit, if he so desires.

This advice alone should have stopped from any further activity but apparently the official did not heed the god advice given to him by the C.S.C.. Thursday at 8.00 A.M. in the morning otherwise a holiday, the Director Mr. U.S. Tiwari called on the telephone at the residence of the presiding judge wanting to speak to him on merits of the matters when he was straight way cautioned by the Judge's wife that it would be in appropriate and he must seek for whatever submission he may desire to make in court. The appointment sought at the residence was denied. This aspect has also been brought to the notice of C.S.C.. This sort of activity cannot be condoned and, thus the court has made a request to the C.S.C. that whichever be the parent department of this officer, this matter of making address to the court beyond the court by the Director Alld. Museum Mr. U.S. Tiwari should be brought to the notice of his superior. For this purpose the

C.S.C. has deputed another S.C. Mr. Hanuman Upadhyaya to do so. Let the court observation be conveyed to Parent Department of Allahabad Museum. "

22. During the course of hearing when this court specifically inquired as to why the respondents including the respondent No. 4/ Sri U.S. Tiwari did not controvert the specific allegations made by the petitioner in para-35 of the writ petition against Sri U.S. Tiwari/respondent No. 4, then a supplementary counter affidavit was subsequently filed submitting in para 6 of the same that by oversight the respondent No. 4 failed to give reply to the contents of para 35 and had at subsequent stage submitted that the respondent No. 4 never used influence of the inquiry officer and the inquiry officer was one Prof. Amar Singh, a distinguished Professor in English Literature in University of Allahabad, who was an outsider and on whom he could not have exercised any influence and in respect of his presence the respondent No. 4 has stated that he was present only when his presence was necessary in order to conduct fair and impartial enquiry. The above derogatory and conflicting replies were given as an after thought and another attempt was made through a short counter affidavit dated 8.4.03 filed by Dr. A.P. Pandey. in paragraph 2 of the supplementary short counter affidavit dated 19.2.02 sworn by respondent No. 4/ Sri U.S. Tiwari, irrelevant facts were mentioned by saying that the petitioner had created nuisance and misbehaved, consequent upon, the inquiry committee consisting of Sri Suresh Chand Pandey and Dr. S.K. Mishra conducting the disciplinary proceedings, had to resign, however these aspects, prima facie are irrelevant for the decision of the present case,

23. The petitioner has placed reliance on the decision of this court (Hon"ble R.B. Misra, J.) in 2003 (1) E.S.C.(All.) (Chandra Bhan Singh v. State of U.P. and Anr.), where the termination of the writ petitioner was set aside for non-observance of principle of natural justice and for not making proper inquiry of specific date, place and time and for not furnishing documents relied upon to the delinquent by the inquiry officer and for not allowing the writ petitioner to cross examine the witnesses and avail personal hearing as such the writ petitioner was allowed to be reinstated in service with 50% of the basic wages payable to the writ petitioner.

This court in Chandra Bhan Singh (Supra) has referred and relied on Union of India and others Vs. Mohd. Ramzan Khan, ; AIR 1958 SC 800, Khem Chand v. Union of India ; AIR 1961 SC 1070, Jagdish Prasad Saxena v. The State of Madhya Bharat; Kulwant Singh Gill v. State of Punjab reported in 1991 SCC (L&S) 998 : Smt. Ram Pyari v. State of U.P. and Anr. reported in 2000(3) ESC 1608 (All) : Radhey Shyam v. Secretary, Minor Irrigation Department and Rural Engineering Services, U.P. and Ors. 2001 (3) ESC 1291 (DB) : 2001 (1) ESC 720 (All) K.P. Giri v. State of U.P. and Ors.; 2002(2) UPLBEC 1321 , Bajrang Prasad Srivastava v. U.P. Pariyojana Prabandlia U.P. State Bridge Corporation Ltd. and Ors.; Registrar of Cooperative Societies, Madras and Another Vs. F.X. Fernando, ; Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills

Federation Ltd., Kanpur and another, . Meenglas Tea Estate Vs. Its Workmen, ; S.C. Girotra Vs. United Commercial Bank (UCO Bank) and Others, ; The Punjab National Bank Ltd. Vs. Its Workmen, ; Associated Cement Co. Ltd. Vs. The Workmen and Another, ; Tata Oil Mills Co. Ltd. v. Their Workmen 1963 (II) LLJ 78 (SC); Employers of Firestone Tyre and Rubber Co. Ltd. Vs. Their Workmen, and Anr. v. Ananda Chandra Prusty, reported in (1998) III LLJ 1207 ; Raj Babu Agnihotri Vs. Labour Commissioner and Others, ; Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, ; A.L. Kalra Vs. Project and Equipment Corporation of India Ltd., ; Dipti Prakash Banerjee Vs. Satvendra Nath Bose National center for Basic Sciences, Calcutta and Others, ; State Bank of India and Ors. v. T.J. Paul 1999 (3) ESC 1708 (All) ; Hardwari Lal Vs. State of U.P. and Others, Prabhudayal Birari v. M.P. Rajya Nagrik Aapurti Nigam Ltd. 2000(4) ESC 2465 (SC) ; Municipal Corporation of Delhi Vs. Prem Chand Gupta, (2000) 10 SCC 115; Vinod Bhanti Vs. State of Bihar and Others, ; Ex. Constable Chhotelal v. Union of India and Ors., (2000) 10 SCC 196; Director of Collegiate Education and Anr. v. Sri Jagadguru Panchacharya Vishwa Dharma Vidya Peetha and Ors; Asstt. General Manager, SBI v. Thomas Jose and Anr., (2000) 10 SCC 280 Scooters India Ltd. v. Labour Court 1989 (1) SCC 31 ; Hardwari Lal Vs. State of U.P. and Others,

In para 13 of the decision of Chandra Bhan Singh (Supra) this court has observed as below :

"(13) The petitioner placed reliance on the judgment dated 25.5.2001 of this Court (DB) (M. Katju and R.B. Misra, JJ.) in Writ Petition No. 7133/2001, Radhey Shyam v. Secretary, Minor Irrigation Department and Rural Engineering Services, U.P. and Ors. (2001) 2 UPLBEC 1676, where the writ petitioner working as Incharge Executive Engineer in the Rural Engineering Services and Minor Irrigation Department was charge-sheeted for his alleged involvement of embezzlement, financial irregularities and financial loss, however, was made handicapped to participate in the inquiry for non-payment of subsistence allowance as well as legal dues during his suspension and the request of change of Inquiry officer was not accepted by the Competent Authority and the ex parte inquiry was conducted behind his back without adopting proper procedure, no specific date, time and place of inquiry was fixed, oral and documentary evidence against the writ petitioner was not adduced in his presence and he was not given opportunity to cross-examine the witnesses against him and he was not afforded opportunity to produce his own witnesses and evidences. The ex parte inquiry was found illegal and the order of dismissal of writ petitioner was quashed while allowing the writ petition, however, keeping in view the financial loss and irregularities it was made open to the respondents to hold afresh inquiry in accordance with law and pass afresh order. It is pertinent to mention that the SLP No. 15226/2001, State of U.P. v. Radhey Shyam Pandey and Ors., preferred against the above order dated 25.5.2001 was dismissed on 1.2.2002 by the Supreme Court."

24. In *G.N. Nayak (Supra)* the Supreme Court has observed that a reasonable possibility of bias or circumstances leading to inference of operation of influence affecting a fair assessment of merits of the case is sufficient to vitiate the action, however any preference which is rational and unaccompanied by considerations of personal interest, pecuniary or otherwise, would not vitiate the action. In reference to the fact finding arrived at the departmental inquiry although are not subject to the judicial review except when based on no evidence or are totally perverse or legally untenable in such circumstances, the doctrine of principle of natural justice must be followed in a departmental inquiry.

In the departmental inquiry the refusal to supply copies of statements of witnesses recorded ex-parte at pre-enquiry stage and documents relied by the department to establish charges before commencement of inquiry in view of the facts and circumstances that large number of witnesses were examined and documents produced to substantiate charges were held in the facts and circumstances that the delinquent officer was denied reasonable opportunity in the departmental inquiry in view of the observations of the Supreme Court in *Kashinath Dikshita Vs. Union of India (UOI) and Others*,

25. In *Kumaon Manlal Vikas Nigam Ltd. (Supra)* where documents were not supplied to the delinquent despite requests and even inspection of some of the documents were denied to him and without affording an opportunity of hearing the inquiry officer gave the finding that the charges against delinquent stood proved, the Supreme Court had held that the High Court has rightly set aside the consequential dismissal order on the ground that there was miscarriage of justice. In *R.G. Teredesai (Supra)* Supreme Court has indicated that in the domestic inquiry the competent authority is under legal obligation to supply entire inquiry report regarding findings and recommending mode of punishment alongwith show cause notice to the delinquent unless the entire report of the inquiry officer including his views in the matter of punishment are disclosed, the requirement of a reasonable opportunity could not be treated to be fulfilled. Similar view was also taken by the Supreme Court in *B.A. Joshi (Supra)*

26. The Supreme Court in *K. Manche Gowda (Supra)* has observed as below :- .

"Under Article 311(2) a Government servant must have a reasonable opportunity not only to prove that he is not guilty of the charges levelled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action. If the grounds are not given in the notice, it would be well nigh impossible for him. to predicate what is operating on the mind of the authority concerned in proposing a particular punishment; he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment is mainly based upon the previous record of the Government servant and that is not disclosed in the notice, it would mean that

the main reason for the proposed punishment is withheld from the knowledge of the Government servant. It would be no answer to suggest that every Government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him; nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. What the Government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. The Court cannot accept the doctrine of "presumptive knowledge" or that of "purposeless enquiry", as their acceptance will be subversive of the principle of "reasonable opportunity". Therefore, it is incumbent upon the authority to give the Government servant at the second stage reasonable opportunity to show cause against the proposed punishment and if the proposed punishment is also based on his previous punishment"s on his previous bad record, this should be included in the second notice so that he may be able to give an explanation."

27. The Supreme Court in *Bachhittar Singh* (Supra) has observed as below:

"Departmental enquiry held against a Government servant cannot be divided into (a) the enquiry (which involves a decision of the question whether the allegations made against the servant are true or not) and (b) taking action (i.e. in case the allegations are found to be true, whether the servant should be punished or not and if so in what manner) and after so dividing the first point cannot be treated as involving a decision on the evidence and described as judicial while the latter as purely an administrative decision liable to be changed by the State. Departmental proceedings taken against a Government servant are not divisible in this sense. There is just one continuous proceeding though there are two stages in it. The first is coming to a conclusion on the evidence as to whether the charges alleged against the Government servant are established or not and the second is reached only if it is found that they are so established. That stage deals with the action to be taken against the Government servant concerned. Both these stages are equally judicial. Therefore, this stage of the proceeding is no

less judicial than the earlier one. Consequently any action decided to be taken against a Government servant found guilty of misconduct is a judicial order and as such it cannot be varied at the will of the authority who is empowered to impose the punishment. Indeed, the very object with which notice is required to be given on the question of punishment is to ensure that it will be such as would be justified upon the charges established and upon the other attendant circumstances of the case. It is thus wholly erroneous to characterise the taking of action against a person found guilty of any charge at a departmental enquiry as an administrative order."

28. I have heard learned counsel for the petitioner. In the present case also the petitioner has not been furnished full documents relied upon by inquiry officer and the inquiry officer has allowed unnecessary participation of the respondent No. 4/Sri U.S. Tiwari who was interested party and was not fair to the petitioner. The specific date, time and place was not fixed for inquiry. The petitioner was not allowed to adduce the witnesses and was not allowed to cross-examine the witnesses. The petitioner was also not given copy of the inquiry report before arriving at the conclusion by the disciplinary authority and no oral hearing was allowed to the petitioner. The charge sheet Was initially issued by Sri U.S. Tiwari though he was complainant and got his statement recorded, and was through out present and kept surveillance over the inquiry. Sri Tiwari was member Secretary of that "Society" as well as of executive committee which had given approval of awarding punishment to the petitioner, more so, the executive committee awarding punishment could not function as an appellate authority and decide the appeal. Therefore, the inquiry and its finding are vitiated and cannot be relied upon, whereas, this court is conscious of its limitation that the court is not to sit over the findings of the disciplinary authority as provided in (1997) 7 SCC 483 (Union of India v. G. Ganayuthan).

29. In the present facts and circumstances, the inquiry has not been fairly made and inquiry lacks providing opportunity of hearing, defiance of principle of natural justice on the part of the respondents The Director/ Sri U.S. Tiwari who having a major role had not bothered to controvert the specific allegations made against him in para 35 and other paragraphs of the writ petition, however in his original counter affidavit and in response to query of court, has endeavoured in futility as an after thought to controvert the contents of para 35 of the writ petition, through his supplementary counter affidavit and subsequent affidavit, therefore non-denial of specific allegations against Sri U. S. Tiwari/respondent No. 4 are treated to be acceptance of the allegations against him in the light of the observations made by Supreme Court in Smt. Naseem Bano Vs. State of U.P. and others, , when, the averments made in win petition are not controverted by the relevant respondents, the Court should on that basis take that averments made in petition as admitted by the respondents. In the present facts and circumstances, the punishments awarded against the petitioner, amounting major punishments were awarded without proper inquiry.

In view of the above observations, the orders impugned in the writ petition are set aside and the writ petition is allowed, however no order as to costs.