
(2015) 03 AHC CK 0082

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 20632 of 2009

Gajendra Prasad Saxena

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 19-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 3 ADJ 455 : (2015) 4 ALJ 530 : (2015) 3 AWC 2434 : (2015) LabIC 3247 : (2015) 2 UPLBEC 1143

Hon'ble Judges : Yashwant Varma, J

Bench : Single Bench

Advocate : Anil Bhushan, for the Appellant

Final Decision : Partly Allowed

Judgement

Yashwant Varma, J.—The petitioner, a Senior Assistant in the Department of Food and Civil Supplies has sought to assail the validity of the order dated 22.5.2007 passed by the respondent No. 3 as affirmed in appeal by the respondent No. 2 vide order dated 25.2.2009. In terms of the impugned order and consequent to culmination of the disciplinary proceedings taken against him he has been inflicted the following punishments:

"(a) A recovery of Rs. 59927/- on account of excess withdrawal from the G.P.F. Account.

(b) Recovery of a sum of Rs. 412789.68/- from him;

(c) the stoppage of one increment with cumulative effect.

(d) the recordal of an adverse entry in the character roll of the petitioner."

This order passed by the respondent No. 3 has been affirmed by the respondent No. 2 acting as the Appellate Authority under the relevant rules.

2. This Court has heard Shri Adarsh Bhushan in support of the writ petition and

Shri Ravi Shankar Prasad, learned Additional Chief Standing Counsel appearing on behalf of the State respondents.

3. The salient facts which may be noticed and as would be relevant for disposal of the instant writ petition are as follows. The petitioner was initially appointed as a Class-III employee in the respondent Department in 1975. He was promoted to the post of Senior Assistant in 1978 and upon attaining the age of superannuation retired on 29.2.2008.

It appears that on 18.7.2005, a charge-sheet was issued against him alleging therein that because of his negligence and misconduct the Government had suffered huge losses consequent to his failure to rectify supplies and accordingly disciplinary proceedings were instituted against him. Upon receipt of the said charge-sheet, the petitioner appears to have elicited further information from the Department vide his letter dated 16.8.2005 and ultimately submitted a reply on 26.9.2005 denying the charges levelled against him. The Inquiry Officer upon receipt of the reply of the petitioner appears to have proceeded in the matter and ultimately submitted a report dated 21.1.2006. The objections of the petitioner were invited upon the findings recorded in the said inquiry report and after receipt of the same and upon a consideration of the reply submitted by the petitioner, the impugned order dated 22.5.2007 came to be passed.

Aggrieved by the aforesaid, the petitioner preferred a Departmental appeal which also came to be dismissed by the order dated 25.2.2009.

4. Shri Adarsh Bhushan, learned counsel for the petitioner has submitted that the impugned order is clearly arbitrary and illegal inasmuch as in the course of the inquiry proceedings the petitioner was neither called before the Inquiry Officer to submit his case, no witnesses were examined in his presence, he was afforded no opportunity of cross-examination nor was the petitioner provided any of the documentary evidence relied upon and referred to in the inquiry report. He has submitted that the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 apply in the facts of the present case and that since a major penalty of stoppage of one increment with cumulative effect had been imposed upon him, the same could not have been inflicted without following the procedure prescribed under the Rules aforementioned and holding of a detailed oral inquiry.

Learned counsel for the petitioner has submitted with reference to the pleadings taken in the writ petition and the inquiry report submitted in this regard to contend that the inquiry proceedings were taken ex parte and that the impugned order is liable to be quashed consequently.

5. Learned Standing Counsel has on the other hand submitted that grave and serious charges had been levelled against the petitioner including those of having caused loss to the Department. He has submitted that the Inquiry Officer has recorded cogent grounds and has taken into consideration evidence existing on record while recording his conclusion that Charge Nos. 1, 2, 3, 7 and 8 stood

proved against him. He has further drawn the attention of the Court to the fact that insofar as Charge Nos. 4 and 9 are concerned, the same were found to have been partly proved and Charge Nos. 5 and 6 were not found proved against the petitioner.

6. It is the admitted case of parties that the provisions of Rules, 1999 referred to hereinabove govern the proceedings taken against the petitioner. In order to appreciate the rival contentions canvassed before this Court, it would be apposite to refer to the following relevant provisions of the aforesaid rules.

"3. Penalties.-The following penalties may, for good and sufficient reason and as hereinafter provided, be imposed upon the Government Servants:

Minor Penalties:

- (i) Censure;
- (ii) Withholding of increments for a specified period;
- (iii) Stoppage at an efficiency bar;
- (iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders.
- (v) Fine in case of persons holding Group "D" posts:

Provided that the amount of such fine shall in no case exceed twenty-five per cent of the months pay in which the fine is imposed.

Major Penalties:

- (i) Withholding of increments with cumulative effect;
- (ii) Reduction to a lower post or grade or time-scale or to a lower stage in a time scale;
- (iii) Removal from the service which does not disqualify from future employment;
- (iv) Dismissal from service which disqualifies from future employment.

Explanation.-The following shall not amount to penalty within the meaning of this rule, namely:

- (i) Withholding of increment of a Government Servant for failure to pass a Departmental examination or for failure to fulfil any other condition in accordance with the rules or orders governing the service;
- (ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar;
- (iii) Reversion of a person appointed on probation to the service during or at the end of the period of probation in accordance with the terms of appointment or the rules and orders governing such probation;

(iv) Termination of the service of a person appointed on probation during or at the end of the period of probation in accordance with the terms of the service or the rules and orders governing such probation.

7. Procedure for imposing major penalties.-Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner:

(i) The Disciplinary Authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the Disciplinary authority:

Provided that where the Appointing Authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned Department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidences and the name of witnesses proposed to prove the same alongwith oral evidences, if any, shall be mentioned in the charge-sheet.

(iv) The Charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence. He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex parte.

(v) The charge-sheet, alongwith the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and

record their oral evidence in presence of the charged-Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidences, the Inquiry Officer shall call and record the oral evidence which the charged Government servant record desired in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer shall proceed with the inquiry ex parte. In such a case, the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The Disciplinary Authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the presenting officer appointed by the Disciplinary Authority is a legal practitioner of the Disciplinary Authority having regard to the circumstances of the case so permits:

Provided that this rule shall not apply in following cases:

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably practicable to held an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules.

10. Procedure for imposing minor penalties.--(1) Where the Disciplinary Authority is satisfied that good and sufficient reasons exist for adopting such a course, it may, subject to the provisions of sub-rule (2) impose one or more of the minor

penalties mentioned in Rule 3.

(2) The Government servant shall be informed of the substance of the imputations against him and called upon to submit his explanation within a reasonable time. The Disciplinary Authority shall, after considering the said explanation, if any, and the relevant records, pass such orders as he considers proper and where a penalty is imposed, reasons thereof shall be given. The order shall be communicated to the concerned Government servant."

7. The Inquiry Officer in terms of his report and as noticed above found that Charge Nos. 1, 2, 3, 7, and 8 stood fully proved, Charge Nos. 4 and 9 were found partly proved and Charge Nos. 5 and 6 were found to be not proved against the petitioner. This report was accepted by the Disciplinary Authority and the petitioner was also provided an opportunity to submit his representation against the same. The order of the Disciplinary Authority records that despite the said opportunity being afforded to the petitioner he submitted no reply. It was in the above background that the Disciplinary Authority proceeded to inflict upon the petitioner the four punishments enumerated hereinabove. It becomes relevant to note here that the charge on the petitioner having caused loss to the extent of Rs. 4,12,789.68/- stood comprised in Charge No. 1. Similarly, the charge of withdrawal of Rs. 59927/- from the G.P.F. was also found proved against the petitioner.

8. This Court finds that the punishment (a), (b) and (d) are liable to be classified as minor penalties. The recovery of loss caused to the Government by negligence or breach of orders from the pay and other dues of the employee is clearly classified as a minor penalty. Insofar the imposition of minor penalties are concerned they are governed by the provisions of Rule 10. This Rule does not envisage the appointment of any Inquiry Officer or the Department instituting regular disciplinary proceedings as envisaged and provided for in Rule 7. The only requirement that Rule 10 places upon the Disciplinary Authority is that he would inform the Government servant of the substance of the charges against him and call for his explanation. The Disciplinary Authority thereafter considering the said explanation and the relevant records may proceed to impose the penalties described as minor penalties under Rule 3.

The only major penalty which has been inflicted upon the petitioner is that of withholding of one increment with cumulative effect. The provisions and procedures laid down in Rule 7 were liable to be followed in respect of the imposition of this penalty alone.

9. There is no dispute with the basic proposition advanced by Shri Adarsh Bhushan, learned counsel for the petitioner that before imposition of a major punishment an oral inquiry must necessarily be held. Shri Adarsh Bhushan has in this connection relied upon a judgment rendered by a learned Single Judge of this Court in Writ Petition No. 10637 of 2007, Shiv Prasad Ram v. State of U.P. and others, decided on 25.11.2010. For our purposes, it would be relevant to

notice what the learned Single Judge held in the above matter. The relevant extracts whereof read as under:

"4. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director, U.P. Co-op. Spg. Mills Federation Ltd., Kanpur and another, (1999) 4 AWC 3227 : (1999) AWC 3227 : (2000) 1 LLJ 990 : (2000) 1 UPLBEC 541 , 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, (2001) 2 UPLBEC 1475 and Laturi Singh v. U.P. Public Service Tribunal and others, Writ Petition No. 12939 of 2001, decided on 6.5.2005.

5. An oral inquiry would be necessary even if the delinquent employee has failed to submit reply to the charge-sheet. In 1996 (7) SCALE 571, the Hon'ble Apex Court held that even if the employee has failed to submit reply to the charge-sheet, it would not absolve the Inquiry Officer from proceeding with the oral inquiry and submit report as to whether charge is proved or not. After recording of evidence, he will find out whether the charge is proved or not and submit report to the disciplinary authority. The aforesaid exposition of law makes it clear that the delinquent employee has a right to defend himself at different stages. When the charge-sheet is served upon him, he has a right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Inquiry Officer. Such Inquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral inquiry, examine witnesses, if produced by the Department, and after the evidence of the Department is completed, the delinquent employee may produce evidence in his defence. During the course of oral inquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Inquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage also. The Inquiry Officer, after completion of oral inquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the inquiry report to the delinquent employee and he would again have a right to submit reply to the inquiry report.

6. Non holding of oral inquiry, therefore, is a serious flaw which vitiates the entire disciplinary proceeding, including the order of punishment."

10. This Court does not dispute the proposition advanced by Shri Adarsh Bhushan, nor does it disagree with what was recorded by the learned Single Judge in the judgment aforementioned. If the Department felt that a major punishment was liable to be imposed upon the petitioner it was obliged and mandated to follow the procedure prescribed in Rule 7. This ordinarily would have set the controversy to rest. The Court, however, is further obliged to

consider the question as to whether the non-following of the procedure prescribed under Rule 7 would also invalidate the imposition of minor penalties. Or to put it differently, will the impugned order fall in entirety on account of this flaw in the procedure adopted by the Respondents?

11. In the opinion of this Court, minor penalties were not liable to be inflicted after following the procedure prescribed under Rule 7. The procedure of a detailed oral inquiry was liable to be followed only in respect of the imposition of the punishment of stoppage of one increment with cumulative effect. The learned counsel for the petitioner has not advanced any submissions touching upon the merits of the charges levelled against him nor has it been contended before this Court that the findings returned by the Inquiry Officer in respect of the charges found proved against him were arbitrary and unsustainable. In fact as noticed above, the sole submission canvassed by Sri Bhushan was the failure of the Respondents to hold an oral enquiry which was mandated for imposition of a major penalty.

12. This Court has gone through the inquiry report and finds that the Inquiry Officer has duly applied his mind to the charges levelled and on the basis of the evidence before him recorded his conclusions with respect to Charge Nos. 1, 2, 3, 7 and 8.

13. The question therefore is whether the order impugned is to be quashed in entirety or whether the doctrine of "partial quashing" is to be applied in the facts and circumstances of the case. In other words this Court would have to consider whether the objectionable part of the order is severable from the valid.

14. The principle of an unconstitutional provision of a statute being severed and struck down leaving other parts untouched is well known. The said principle of severability has been extended to orders also. This is how the above position was explained by the Constitution Bench of the Apex Court in *Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others*, AIR 1960 SC 321 : (1960) 2 SCR 146 .

"(10a) This brings us to the question of relief to be granted to the petitioners. It is contended on behalf of the Department that all that this Court can do is to quash the order of December 15, 1958, and send the case back to the Authority for consideration of the question of renewal afresh. On the other hand, the petitioners contend that this Court should quash the illegal condition limiting the duration of the renewal to one year and direct the Authority to specify a period of not less than three years and not more than five years in conformity with Section 58(1)(a) in the order of renewal. This raises the question of severability of a part of the order passed by the Authority. The principles on which any unconstitutional provision can be severed and struck down leaving other parts of a statute untouched were laid down by this Court in *R.M.D. Chamarbaugwalla Vs. The Union of India (UOI)*, AIR 1957 SC 628 : (1957) 1 SCR 930 and the first

principle is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. This principle relating to statutes was extended by this Court to orders in *Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others*, AIR 1958 SC 845 : (1958) CriLJ 1355 : (1983) ECR 1701 : (1983) 13 ELT 1305 : (1959) 1 SCR 821 , where a part of the order of the Collector of Customs was quashed. The question therefore resolves into this: would the Authority have ordered renewal if it knew that it could not reduce the period of a permit to below three years? Looking at the facts of these cases which we have set out earlier, it is to our mind obvious that the Authority would have granted renewal in the circumstances of these cases when it did so in December 1958. The previous permits in these cases had expired on March 31, 1958, and the petitioners had been plying their stage carriages right up to the time when the order was passed on December 15, 1958; they could not do so without a permit in view of S. 42 of the Act. Therefore, renewal in these cases was certain when the order was passed on December 15, 1958. In the circumstances it is open to us to sever the illegal part of the order from the part which is legal, namely, the grant of the renewal."

15. Following the principle laid down above, the doctrine of severability was applied to an order of dismissal with retrospective effect by the Apex Court in *R. Jeevaratnam Vs. The State of Madras*, AIR 1966 SC 951 : (1967) 14 FLR 285 : (1967) 1 LLJ 391 : (1966) 2 SCR 204 , in the following manner:

"4. The order dated October 17, 1950 directed that the appellant be dismissed from service with effect from the date of his suspension, that is to say, from May 20, 1949. In substance, this order directed that (1) the appellant be dismissed, and (2) the dismissal do operate retrospectively as from May 20, 1949. The two parts of this composite order are separable. The first part of the order operates as a dismissal of the appellant as from October 17, 1950. The invalidity of the second part of the order, assuming this part to be invalid, does not affect the first part of the order. The order of dismissal as from October 17, 1950 is valid and effective. The appellant has been lawfully dismissed, and he is not entitled to claim that he is still in service."

16. The above position in law as struck by the Hon"ble Supreme Court was reiterated again in *State Bank of Patiala and Another Vs. Ram Niwas Bansal (Dead) through L.Rs.*, AIR 2014 SC 1264 : (2014) AIRSCW 1482 : (2014) 3 JT 545 : (2014) 3 LLJ 191 : (2014) 3 SCALE 314 , in the following words:

"15. Regard being had to the nature of controversy, we shall proceed to deal with the first point first, that is, whether the order of removal could have been made with retrospective effect. Mr. Patwalia, learned Senior Counsel appearing for the employee, has submitted that the disciplinary authority could not have passed an order of removal by making it operational from a retrospective date. He has commended us to a three-Judge Bench decision in *R. Jeevaratnam v. State of Madras* [*R. Jeevaratnam Vs. The State of Madras*, AIR 1966 SC 951 : (1967) 14 FLR 285 : (1967) 1 LLJ 391 : (1966) 2 SCR 204] . In the said case, the

appellant therein instituted a suit for a declaration that the order of dismissal from service was illegal and void. The trial Court dismissed the suit and the said decree was affirmed in appeal by the High Court. One of the contentions raised before this Court was that the order of dismissal dated 17-10-1950 having been passed with retrospective effect i.e. 29-5-1949, was illegal and inoperative. This Court opined that an order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The said principle has been followed in *The Gujarat Mineral Development Corporation Vs. Shri P.H. Brahmbhatt*, AIR 1974 SC 136 : (1974) 1 LLJ 97 : (1974) 3 SCC 601 : (1974) 2 SCR 128 : (1974) 1 SLJ 272 ."

17. One may in this connection also usefully refer to the enunciation of the principle of severability as laid down by the Apex Court in *State of Mysore and Others Vs. K. Chandrasekhara Adiga and Another*, AIR 1976 SC 853 : (1976) 2 SCC 495 .

"27. The only question that remains to be considered is, whether the High Court should have quashed the order of assignment in toto or only the illegal part of it. This question depends on the exigencies of each case because this Court is not fettered in the exercise of its discretion by the technical rules relating to the issue of writs by the English Courts. The first point to be considered in the context of making an appropriate order or direction in such cases is whether the valid and the invalid portions of the order are severable, and if so, whether after excision of the invalid part, the rest remains viable and self-contained. In the instant case the illegal condition in the order of assignment is not an integral part of the assignment, in the sense, that its deletion cannot render the rest which has been found to be valid, truncated and ineffective."

18. This Court is of the opinion that in light of what was found by the Enquiry Officer on the evidence and material before it, the Disciplinary Authority would have been fully justified in imposing the minor penalties finding mention in the impugned order. In situations like these the Court is also mindful of what the Apex Court held in *State of Orissa Vs. Bidyabhushan Mohapatra*, AIR 1963 SC 779 : (1963) 1 LLJ 239 : (1963) 1 SCR 648 Supp :

"9.....The recommendation of the Tribunal was undoubtedly founded on its findings on Charges 1(a), 1(c), 1(d) and Charge (2). The High Court was of the opinion that the findings on two of the heads under Charge (1) could not be sustained because in arriving at the findings the Tribunal had violated rules of natural justice.....Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant....."

19. In the opinion of the Court, therefore, the impugned order of punishment is clearly severable. The part of the impugned order insofar as it imposes minor penalties upon the petitioner cannot be upset or set-aside by this Court either in exercise of its powers of judicial review or on the basis of the submissions advanced by the learned counsel for the petitioner.

20. In a position of this nature, this Court exercising powers under Article 226 of the Constitution of India can very well proceed to partially quash an order if it finds that the invalidity can be earmarked and separated/excised from the otherwise valid part of the order assailed before it. In the facts of the present case, this Court finds that the invalidity by which the impugned order suffers pertains only to the imposition of major penalties. The said part of the order is severable and it is to that extent alone that this Court feels compelled to interfere. It is the undisputed position that under the Rules, 1999 insofar as the power of imposition of minor penalties is concerned, the same was not liable to be preceded by an oral enquiry. The Rules, 1999 only mandated that the authority would elicit an explanation from the concerned employee and proceed to pass orders after taking the same into consideration. The authority, therefore, would have been fully justified in making the order impugned on the basis of the response submitted by the Petitioner and the material before him. This Court is further convinced in arriving at the above conclusion in light of the fact that the findings recorded by the Enquiry Officer and the Disciplinary Authority have not been assailed on merits before this Court and the submissions have been confined to the infraction of Rule 7 of the Rules, 1999 and the principles of natural justice. Accordingly, and in view of the above, this writ petition is partly allowed. The impugned order insofar as it imposes punishment of stoppage of one increment with cumulative effect is hereby quashed. Consequential reliefs, if any, which are liable to flow to the petitioner shall be considered by the respondents in light of what is recorded by this Court hereinabove.