
(2012) 02 AHC CK 0354

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 52772 of 2008

Gulab Chandra Yadav (Constable Cr 1009)

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-02-2012

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Criminal Procedure Code, 1973 (CrPC) — Section 173
Penal Code, 1860 (IPC) — Section 122B, 392
Police Act, 1861 — Section 46(2)
Prevention of Corruption Act, 1988 — Section 13(2), 7, 8, 9
Uttar Pradesh Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 — Rule 14(1), 16, 16(1), 16(2), 4(1)

Citation : (2012) 4 ADJ 357 : (2012) 3 AWC 2978

Hon'ble Judges : Ram Surat Ram (Maurya), J

Bench : Single Bench

Advocate : Amit Kumar Rai, for the Appellant;

Final Decision : Allowed

Judgement

Hon"ble Ram Surat Ram (Maurya),J.

1. I have heard counsel for the petitioner and Standing counsel for the State. The writ petition has been filed for quashing the order dated 13.11.2007 passed by Superintendent of Police, Chandauli (Respondent-4) by which the petitioner was terminated from the service exercising the power under Proviso (b) to Rule 8 (2) of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules 1991 (the Rules) and order of Deputy Inspector General of Police, Varanasi Range, Varanasi (Respondent-3) dated 29.2.2008 by which appeal of the petitioner has been dismissed and order of Inspector General of Police, Varanasi Zone, Varanasi (Respondent-2) dated 27.6.2008 by which revision of the petitioner has been dismissed.

2. The petitioner was recruited as constable in U.P. Police on 1.1.1987. The petitioner was transferred to Police Station Chandauli on 25.2.2007. Since then

he was doing his duties there. On 27.9.2007, Sri Sharda Prasad Sharma, Traffic Inspector, lodged a FIR (registered as Crime No. 271 of 2007, u/s 392 I.P.C, and Section 7/ 13(2) of Prevention of Corruption Act, 1988) against the petitioner and one other constable Ghan Shyam Singh, alleging therein that Shiv Pujan Thakur, driver of Truck No. J.H.-11-B-2802 and Faruk, driver of Truck No. UP-75-H-8841, informed him that two persons, one in police uniform and other in civil dress, extracted Rs. 700/- each from them. He further alleged that these drivers could not state the names of those persons. Two constables namely Rajesh Singh and Rai Sahab Singh were doing picket duty at Chandauli turn. Out of whom Rai Sahab Singh informed that constables Gulab Yadav and Ghan Shyam Singh had extracted money from truck drivers.

3. On the basis of the aforesaid FIR, Superintendent of Police, Chandauli suspended the petitioner vide order dated 29.9.2007 and directed Circle Officer, Chandauli to conduct an inquiry and submit his report.

4. On 7.11.2007 another FIR [i.e. Crime No. 359 of 2007 under Sections 7, 8,9, 13(2) of Prevention of Corruption Act, 1988 and Section 122-B IPC) was lodged by Sri Harinath Yadav, Dy. S.P. Ante Corruption Cell, Varanasi at Police Station Ali Nagar, Chandauli alleging therein that a raid was conducted in which Samar Bahadur Singh, Vimal Prasad Gupta and Nand Lal Singh were arrested red-handed while extracting money from truck drivers on G.T. Road on 7.11. 2007 at 5.45 a.m. While three other persons ran away from the spot, who were also there. Samar Bahadur Singh (accused) informed the name of the persons who run away from the spot as the constables of P.S. Chandauli, Vinod Singh, Gulab Yadav and Dig Vijay Singh. Accordingly, these persons have formed a gang for extracting money from the Truck drivers and are indulged in committing crime.

5. Sri Devesh Kumar Sharma, Circle Officer, Sakaldeepa, Chandauli was appointed to conduct preliminary inquiry in the aforesaid case. He wrote a letter dated 13.11.2007 to Superintendent of Police, Chandauli for terminating the petitioner from service invoking power under Proviso (b) of Rule 8 (2) of the Rules.

6. Superintendent of Police, Chandauli vide order dated 13.11.2007 terminated the services of the petitioner invoking powers under Proviso (b) to Rule 8(2) of the Rules. In the order dated 13.11.2007, he has mentioned that after registration of case Crime No. 359 of 2007 of P.S. Ali Nagar, Chandauli, a preliminary inquiry was done by Sri Devesh Kumar Sharma, Circle Officer, Sakaldeepa, Chandauli, who has informed that prior to this incident, Gulab Yadav was charged for extracting money from the drivers of vehicles in the year 1995. He was again charged for demanding money from one Sukhvindra Singh, a business man on 16.5.2003 and thereafter case crime No. 271 of 2007 u/s 392 I.P.C. and Section 7, 13 (2) of Prevention of Corruption Act was registered against him at P.S. Chandauli on 27.9.2007 on the complaint of Sri Sharda Prasad Sharma, Traffic Inspector for extracting money from Truck drivers. In which he was suspended on 29.9.2007. Gulab Chandra Yadav has not reported at

Police Lines after suspension and is continuously absent and is not turning up for the inquiry, as such, it would be appropriate to proceed against him under Proviso (b) to Rule 8(2) of the Rules. Relying upon the preliminary report of Sri Devesh Kumar Sharma, it was found that the petitioner alongwith other constables, were involved in extracting money, from drivers of the vehicles. Even after suspension he had formed a gang for extracting money. The petitioner has lowered the image of the Police Department by his activities. Since the petitioner has not reported to the Police Lines, in accordance with his suspension order, as such, it appears that he was not willing to do service and remain involved in committing crime. It is not possible to collect evidence in respect of his criminal activities. Accordingly, holding inquiry under Rule 14(1) of the Rules is not reasonably practicable.

7. The termination order was served upon the petitioner by pasting it's copy on the parental house of the petitioner on 17.11.2007. The petitioner on coming to know about this order filed an appeal through registered post on 29.1.2008 before Deputy Inspector General of Police, Varanasi Range, Varanasi. In the memorandum of appeal, the petitioner has stated that he was illegally named as an accused in crime No. 271 of 2007, on the basis of hearsay information given by a person who was not present on the place of incident. The petitioner apprehended for his arrest in the aforesaid case as such he was making effort for obtaining bail order from the Court. In the meantime another FIR of Crime No. 359 of 2007 was lodged, in which the petitioner was again named on the basis of statement of an accused of that case. The Inquiry Officer, on the basis of preliminary inquiry, has submitted the report for terminating the petitioner under Proviso (b) of the Rule 8 (2) of the Rules. So far as earlier cases are concerned, the petitioner has been awarded adverse entry without considering his reply in it. In case crime No. 271 of 2007, Truck driver, Shiv Pujan Thakur has filed his affidavit in the Court in which involvement of the petitioner has been denied. Since FIR of cognizable offences have been registered against the petitioner, he in order to avoid his arrest, absented from duty on legal advice and was making effort for obtaining bail during these periods.

8. Deputy Inspector General of Police, Varanasi Range, Varanasi by his order dated 29.2.2008 dismissed the appeal of the petitioner. The petitioner filed a revision before Inspector General of Police, Varanasi Zone, Varanasi which was dismissed on 27.6.2008. Hence, this writ petition has been filed.

9. The counsel for the petitioner submits that :

The disciplinary authority acted on the report of preliminary inquiry, submitted within a week of registering of the criminal case;

The petitioner was named in the FIR either on the basis of hearsay information or on the statement of the accused, before investigation of the criminal cases, and without collecting any evidence, the petitioner cannot be held guilty for the offences;

Apart from the preliminary inquiry report, there was no material before the disciplinary authority holding the petitioner as guilty;

The disciplinary authority has himself initiated an inquiry against the petitioner, he should have waited the report of Inquiry Officer;

Power under Proviso (b) to Rule 8 (2) of the Rules has been arbitrarily invoked for dismissing the petitioner from service;

For exercising the powers under Proviso (b) to Rule 8 (2) of the Rules the disciplinary authority has to record the finding that the inquiry is not reasonably practicable, while in this case only due to seriousness of the charges inquiry was not held.

10. In reply Standing Counsel submits that the petitioner was found as habitual of committing offence of extracting money from truck drivers and general public. Several cases were registered against him. Duty of police is to control the crime and not to commit crime. Retaining the petitioner in service is seriously damaging image of police department in public and polluting the atmosphere. Since the petitioner has not reported to the Police Lines after suspension and was continuously absent and was not cooperating with the inquiry as such power under Proviso (b) of Rule 8(2) of the Rules has been rightly exercised. Satisfaction of the disciplinary authority in this respect is not open for review by the Court in exercise of writ jurisdiction.

11. In exercise of power u/s 46 (2) of the Police Act, 1861, the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991 (the Rules) has been framed. Rule 5 provides to follow the procedure for awarding different punishments. For awarding major punishment enumerated in Clause (a) of Rule 4(1), procedure given under Rule 14(1) has to be followed. Rule 14(1) provides for conducting departmental inquiry according to the procedure laid down in Appendix-I. Rule 16(1) provides that in case police officer deliberately absents himself from the place of posting or to whom it is impossible for the inquiry officer to contact, departmental inquiry be taken in absentia. Rule 16(2) require that before taking departmental proceeding in absentia, the concerned authority shall record in writing that in spite of all reasonable steps having been taken so it has not been possible to serve the charge on him and obtain his explanation or to secure his personal presence. Purpose of holding inquiry is to give the charged employee a reasonable opportunity to defend him.

12. The question arises for consideration as to whether power under Proviso (b) of Rule 8 (2) of the Rules has been properly invoked? In order to appreciate the controversy Proviso (b) of Rule 8 (2) of the Rules is extracted below.

Rule 8(1)-.....

(2) No police officer shall be dismissed or removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules;

Provided that this Rule shall not apply

(a).....

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry.

13. How and in what circumstances the power given in proviso to the Statute has to be exercised ?

In Principles of Statutory Interpretation, written by Mr. Justice G.P. Singh, 12th Edition of 2010, on page 208 says that a proviso will not be normally construed as reducing the purview of enactment to a nullity or to take away a right clearly conferred by the enactment.

Supreme Court, in, Sree Raghuthilakathirtha Sreepadangalavaru Swamiji Vs. The State of Mysore and Others, , held that a proviso is normally in the nature of a qualification or exception and therefore, it does not nullify the enactment.

Supreme Court, in, Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, , held that, a provision in the nature of an exception cannot be so construed as to subsume the main provision and thereby nullify the right conferred by the main provision.

Supreme Court, in, Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector and E.T.I.O. and Others, , held that a proviso is used to remove special cases from the purview of general enactment.

14. Thus, from the aforesaid dictum, it is clear that a proviso cannot be allowed to swallow up the general rule. Normally main provision of law has to be followed. When main provision of law is mandatory, then all efforts have to be made to follow it. Exception to the main provision is not an alternative provision. The authority has no privilege to choose one of them and not free to follow any of the provision on his sweet will. Mandatory provisions of law cannot be ignored in the guise of the power under proviso. Proviso has to be followed in the category of cases, mentioned in it.

15. Rule 8(2) is worded in negative wording. Thus, it is mandate of the law that no police officer shall be dismissed from service except after proper inquiry and disciplinary proceedings as contemplated by the Rules. Exceptions to this rule have also been provided under Proviso (a), (b) and (c). Proviso (b) of Rule 8 (2) authorises the authority to dismiss an employee from service without holding any inquiry if he is satisfied that for the reason to be recorded in writing that it is not "reasonably practicable" to hold such inquiry. Word " reasonably" is adjective to the word "practicable". It means that in the facts and circumstances of the case, a reasonable man forms his opinion that holding inquiry is not " practicably". Practicability of holding inquiry is matter of assessment of attending circumstances. Opinion has to be formed in writing as to whether inquiry is

"practicable" or not. Supreme Court in Chief Security Officer and Others Vs. Singasan Rabi Das, , held that reasons recorded must ex facie show that it was not "practicable" to hold inquiry and must not be vague or irrelevant.

16. Proviso (b) of Rule 8 (2) of the Rules has come for consideration before this Court time to time. In State of U.P. And others v. Chandrika Prasad, 2006 (1) ESC 374 (DBJ), power under Proviso (b) of Rule 8(2) has been invoked for the reason that employee was polluting atmosphere at police lines on account of indiscipline; he was using his licensed gun for giving threat to other person and witnesses. It was held that it was not a fit case for holding that the inquiry was not "reasonably practicable". Exercise of power under Proviso (b) of Rule 8 (2) was held as arbitrary.

17. In Babban Chaturvedi v. State of U.P., 2009 (6) ADJ 216, the employee, a police constable was caught red handed while taking bribe. Power under Proviso (b) of Rule 8 (2) was exercised on the ground that by accepting bribe image of the department in the society has been lowered; Prolong inquiry will encourage other police personal to involve in corruption. It was held that it is not a good reason to invoke the power. Similar view has been taken in Puspendra Singh v. State of U.P., 2008 (2) UPLBEC (Sum) 96 and Constable CP541 Daya Shanker Tiwari and another v. State of U.P. And others, 2011 (1) UPLBEC 513 (DB).

18. In the present case reason for exercising power under Proviso (b) of Rule 8 (2) has been given that the act of the petitioner disentitled him to remain in service; his continuance in service is not in the interest of department and due to his act, the image of the department has been lowered. Reasons as recorded for not holding inquiry relate to the gravity of the charge and does not show that for these reasons inquiry was not practicable. Thus, power under Proviso (b) of Rule 8 (2) has been arbitrarily exercised on irrelevant consideration.

19. The Standing counsel argued that after suspension, the petitioner had not reported to the Police Lines and was continuously absent as such inquiry was not practicable. Purpose of inquiry is to find out as to whether evidence of the department is sufficient to hold the employee as guilty of misconduct. Even if in the absence of employee, duty of the Inquiry Officer was to examine the oral and documentary evidence of the department and to record a finding as to whether the un rebutted evidence are sufficient to hold the charges as proved. Rule 16 provides for holding inquiry in absentia. Thus, absence of employee cannot be a ground for invoking power under Proviso (b) of Rule 8 (2) of the Rules.

20. Supreme Court in the case of Union of India and Another Vs. Tulsiram Patel and Others, while interpreting similar provision under Proviso (b) of Article 311 (2) of the Constitution held that if the Government servant absconds and cannot be served or will not participate in the inquiry, the matter must be proceeded ex parte on the material before the disciplinary authority.

21. Supreme Court, in, A.K. Kraipak and Others Vs. Union of India (UOI) and Others, , has held that departmental proceeding is quashi judicial proceeding. In

State of U.P. and Others Vs. Saroj Kumar Sinha, , held that an Inquiry Officer acting as a quasi Judicial authority is in a position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/Government. His function is to examine the evidence produced by the department. Even in the absence of the delinquent official he has to see as to whether unrebutted evidence is sufficient to hold that the charges are proved. Departmental proceeding cannot be treated as a casual exercise. Inquiry proceeding, cannot be conducted with a close mind. Inquiry Officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that the justice is done but manifestly seen to be done.

22. In this case by the order dated 29.9.2007 Circle Officer, Sadar, Chandauli was appointed for holding inquiry against the petitioner. In the meantime another F.I.R, of Crime No. 359 of 2007 was registered on 7.11.2007. Sri Devesh Kumar Sharma, Circle Officer, Sakaldeepa, after holding preliminary inquiry, wrote a letter within a week for dismissing the petitioner invoking power under Proviso (b) of Rule 8 (2) of the Rules and impugned order has been passed on it's basis even without waiting for the report of the Inquiry Officer who was proceeding with the inquiry against the petitioner. Thus, it is proved that power has been invoked not for the reasons mentioned in Proviso (b), but on the irrelevant consideration.

23. The standing counsel next argued that satisfaction recorded by the authority is final and the Court has no jurisdiction to review it. In Union of India v. Tulsiram Patel (vide paragraph 130) Supra, it has been held that in case power under Proviso (b) of Article 311 (2) has been invoked lightly, arbitrarily, out of ulterior motive or merely in order to avoid the holding of an inquiry the Court will be competent to strike down the order dispensing with the inquiry and order imposing the penalty. In this case also power has been exercised arbitrarily without any material on record on irrelevant consideration as such it is liable to be set aside.

24. Another question arise for consideration is as to whether an employee can be dismissed from service without there being any evidence on the basis of which, opinion can be formed that the misconduct of the employee is proved, justifying his dismissal from service. Supreme Court in State of U.P. v. Suraj Kumar Sinha (Supra) held that disciplinary authority as an independent adjudicator has to see as to unrebutted evidence is sufficient to hold that charges are proved. Thus, in these cases, where holding of the inquiry is not reasonably practicable, also the disciplinary authority has to form his opinion that the charges are proved on the basis of evidence of the department.

25. In this case, the disciplinary authority has found the petitioner as guilty on the basis of report dated 13.11.2007 of the preliminary inquiry. In this report, a misconduct of the year 1995 has been referred in which the petitioner was given punishment of censure. In another case mentioned in the report of the year 2003, the Investigating Officer submitted final report against the petitioner,

which has been accepted by the Court. However, in the departmental proceeding, the petitioner was given punishment of censure. Case Crime No. 271 of 2007 was registered on the statement of Rai Sahab Singh who was not on the spot. While Shiv Pujan Thakur, victim of this case filed his affidavit before Special Judge in which he had denied involvement of the petitioner in committing crime. Crime No. 359 of 2007 was registered on the basis of statement of the main accused of that case. Till the impugned order was passed, no material was collected during investigation to prove the involvement of the petitioner in these cases, and the Investigating Officer could not submit his report u/s 173 Cr. P.C. Thus, there was no evidence to prove the misconduct of the petitioner. Impugned order dismissing the petitioner has been passed on the preliminary inquiry report and not on any evidence. In the result, the writ petition succeeds and is liable to be allowed.

ORDER

The writ petition is allowed and the order dated 13.11.2007, passed by Superintendent of Police, Chandauli, order dated 29.2.2008, passed by Deputy Inspector General of Police, Varanasi Range, Varanasi and order dated 27.6.2008, passed by Inspector General of Police, Varanasi Zone, Varanasi, are set aside. The petitioner shall be reinstated in service. It shall be open for the respondents to conduct inquiry against the petitioner in accordance with law. Consequential benefits will depend upon the result of the inquiry.