

(2012) 10 J&K CK 0004
In the Jammu And Kashmir High Court
Case No : LPA No. 68 of 2011

J and K S.R.T.C.

APPELLANT

Vs

Mohammad Ramzan Gabroo and Another

RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Evidence Act, 1872 — Section 58

Citation : (2012) 10 J&K CK 0004

Hon'ble Judges : M.M. Kumar, C.J; Mohammad Yaqoob Mir, J

Bench : Division Bench

Advocate : A. Haqani, for the Appellant; M.A. Qayoom, for the Respondent

Judgement

M.M. Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent is directed against judgment and order dated 28.05.2010, rendered by the learned

Single Judge of this Court in SWP No. 551/2009 holding that the punishment of dismissal inflicted upon the writ petitioner-respondent was

unsustainable on the ground that the charge sheet had been framed against him by the General Manager and not by the Disciplinary Authority as

per the provisions of Rule 148 of the Jammu and Kashmir State Road Transport Corporation Employees Service Regulations, 1979 (for brevity

'the Regulations'). The enquiry proceedings were also declared to be illegal as enquiry had not been conducted in accordance with the Regulations.

There is no dispute on facts. The writ petitioner-respondent was appointed on the substantive post of Bus Washer on 26.10.1987, in the

appellant-Corporation. In order to appreciate the controversy with regard to the Appointing Authority of the writ petitioner-respondent, it would

be appropriate to read order of his appointment which is as under:-

Sub: Appointment under SRO 122

Ref:- Board of Director's Agenda Item No. 31.31 decision taken on 14.03.1987.

ORDER

Sanction is hereby accorded to the appointment of Mr. Mohammad Ramzan S/o Mohamamd Sidiq deceased driver-649 R/o Magharmal Bagh,

Srinagar as Bus Washer in the pay scale of Rs. 710-1200/- plus Cola as admissible under Corporation rules.

The appointee will report within 30 days to Manager Tourist Services SRTC, Srinagar on production of the following certificates.

1. State Subject.
2. Age & Health Certificate
3. Character Certificate

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By order.

Sd/-

General Manager

JKSRTC, Sgr.

2. He was transferred and posted in Tourist services in the appellant- Corporation at Jammu on 07.11.1996 (Annexure-B). He was promoted to

the post of Conductor vide order dated 01.02.1997. The writ petitioner-respondent did not accept the same. A perusal of the promotion order

dated 01.02.1997 would show that the recommendation for his promotion alongwith others was made by Departmental Promotion Committee

which was approved by the Chairman of the appellant-Corporation. Thereafter, he was posted as Counter Assistant at Tourist Service Division,

Tourist Reception Centre, Srinagar. As a part of his assignment as a Counter Assistant, the writ petitioner-respondent used to be allotted books of

ticket voucher, duly numbered, for issuing the same to the passengers against payment of bus fare. Amongst many other books of passenger

vouchers, he was allotted two ticket books bearing S. No. 46151 to 46200 and 46201 to 46250 on 29.03.2003 for sale at 'A' Class Tourist

Service Division Counter. The voucher in the aforesaid ticket books remained

unutilized for some years. The case of the appellant department is that the writ petitioner-respondent surreptitiously and fraudulently utilized the voucher from the aforesaid ticket books for the month of October, 2007 and collected handsome amount of Rs. 40,040/- by the sale of voucher to the 'A' Class passengers. The entire sale proceeds were misappropriated by him without either sending any information to his superior or the appellant-Corporation or depositing the same in the accounts of the Corporation. It led to holding of a preliminary enquiry and the writ petitioner-respondent was placed under suspension on 21.04.2008 (Annexure E).

3. A perusal of the suspension order would show that pending formal enquiry into the embezzlement of the amount, he was placed under suspension and one Mohammad Yonis Khan, Incharge Traffic Manager (City) was appointed as an Enquiry Officer. The order has been duly signed by the General Manager (Administration) of the appellant-Corporation. The suspension order was followed by charge sheet dated 20.05.2008 (Annexure-F). The charge sheet has been duly replied by the writ petitioner-respondent on 21.05.2008. According to the appellant-Corporation, the writ petitioner-respondent has candidly admitted the charge of misappropriating the money collected by sale of voucher and utilization of the same towards his personal needs. He deposited a sum of Rs. 25,000/- with the appellant-Corporation against the total misappropriate amount of Rs. 40,040/- he thus admitted his guilt unconditionally and unequivocally and no enquiry, thereafter, was required to be held as per the perception of the appellant-Corporation. Thereafter, the Enquiry Officer-respondent no. 2 submitted his report in July, 2008 revealing that the writ petitioner-respondent had accepted the allegation of misappropriation of Corporation funds. On the basis of the aforesaid report, the service of the writ petitioner-respondent was dispensed with. The order of termination and the enquiry proceedings were challenged by the writ petitioner-respondent on various grounds. According to the prayer made in the writ petition, he sought quashing of suspension order dated 21.04.2008, charge sheet dated 20.05.2008, report of the Enquiry Officer and also the order of his termination. Another prayer made by him in the writ petition was that a writ of Mandamus be issued to the appellant and its

officers to treat the writ petitioner-respondent in service on the fiction as he was never suspended or terminating from service with all consequential benefits.

4. The learned Single Judge felt persuaded by the argument that the acts of issuance of suspension order, initiation of enquiry proceedings and passing of order of dismissal were affected by an Authority subordinate to the Appointing Authority which contravened Regulation 148. The view of the learned Single Judge is discernible from the following extract of the judgment which reads thus:-

Under this rule power to frame definite charge on the basis of allegations against an employee, vests in the disciplinary authority only. An authority subordinate to such an authority cannot act in this behalf.

Admittedly in the present case charge sheet has been framed against the petitioner by the General Manager and not by the disciplinary authority himself.

Thus I find mandatory provisions of the rules has not been complied with. The enquiry conducted was not, therefore, in accordance with the rules.

In these circumstances, I find the penalty imposed on the petitioner having basis on an irregular enquiry, cannot stand.

This petition is allowed and the order of termination JKSRTC/EC-II/2667 dated 31.01.2009 impugned is set aside.

5. Mr. Haqani, learned counsel for the appellant-Corporation has vehemently argued that once the charge of misappropriation of funds belonging to the Corporation has been admitted by the writ petitioner-respondent then no other question could be raised by him. According to the learned counsel there was no necessity to hold any enquiry after he has pleaded guilty because no trivial issue would survive. In support of his submission, learned counsel has placed reliance on the observations made by Hon'ble the Supreme Court in paras 16 to 19 of the judgment rendered in the case of Chairman and MD V.S.P. and Others Vs. Goparaju Sri Prabhakara Hari Babu, .

6. Mr. M.A. Qayoom, learned counsel for the writ petitioner-respondent has vehemently argued that the writ petitioner-respondent has been subjected to unfair and unjust treatment at the hands of the appellant-Corporation. According to the learned counsel, writ petitioner-respondent

was not given his due promotion on the post of Conductor despite his representation disclosing that he deserved to be given promotion from a date his juniors were promoted. Learned counsel has also submitted that the reason for misappropriation was that the writ petitioner-respondent did not receive salary for months together and his wife needed medical help and, therefore, it should be considered as a mitigating circumstance for the view taken by the learned Single Judge. He also submitted that as per the provisions of Regulation 148 of the Regulations, the penalty of dismissal could have been inflicted only by the Managing Director and not by the General Manager (Administration).

7. Having heard learned counsel for the parties and perusing the record of the appeal as well as writ petition, we find that it would be necessary to determine as to who is the Appointing Authority of the writ petitioner-respondent. The writ petitioner-respondent was substantive holder of the post of Bus Washer. The appointment letter dated 26.10.1987 (Annexure-A) was issued by General Manager of the appellant-Corporation, although according to the reference made, the appointment letter was issued in pursuance of decision taken on 14.03.1987 by the Board of Directors on Agenda Item no. 31.31. The Appointing Authority is the General Manager (Administration) which is approved by the Board of Directors/Corporation. The learned Single Judge has failed to point out as to how the Managing Director of the Corporation would be his Appointing Authority. Mere reliance on Regulation 148 would not be sufficient because it only says that the major penalties like dismissal could be inflicted by the Disciplinary Authority. In the present case, the General Manager (Administration) of the appellant-Corporation passed the order transferring him to Jammu on 07.11.1996 and also issued the order promoting him temporarily as Conductor in the pay scale of Rs. 825-1500. The aforesaid order dated 01.02.1997 was issued on the recommendation made by the Departmental Promotion Committee which were duly approved by the Chairman of the appellant-Corporation. The suspension order was also issued by General Manager (Administration) (Annexure-E) on 21.04.2008 and even the Enquiry Officer was appointed by him.

8. The writ petitioner-respondent did not anywhere raise the objection before the Enquiry Officer that he was the creator of an incompetent

authority and, therefore, no enquiry could be held by him. It was impermissible for him to plead for the first time before the writ Court that the

suspension order, charge sheet and appointment of Enquiry Officer has been made by an Authority subordinate to the Disciplinary Authority

particularly when he has candidly admitted the allegations. The writ petitioner-respondent did not cite any Rule or Regulation which may show that

the Managing Director was his Disciplinary/Appointing Authority. Even at the appellant stage, no provision was pointed out to us to show as to

who was his Disciplinary or the Appointing Authority as a Bus Washer.

9. The writ petitioner-respondent has in unmistakable terms conceded misappropriation when he filed reply to the charge sheet. It would first be

necessary to read the charge sheet which is as under:-

Whereas ticket book No. 46151 to 46200 and 46201 to 46250 stands issued to you for sale at 'A' Class TSD Counter on 29.03.03 but as

intimated by MTC SRTC, Sgr, the sale of said ticket books was not carried out till 10/2007.

Whereas after selling said tickets, the amount generated from these ticket books has not been deposited by you in SRTC Chest and have adopted

a unique method to defraud and misappropriate the Corporation Revenue.

Whereas you have been issued a handsome amount of ticket blocks w.e.f. 12.09.2005 to 02.01.2008 for sale on 'A' Class Counter and for

Darbar Move there is every apprehension that you might ---- adopted ---- to said ticket books.

Whereas in order to investigate/examine the said ticket books, challans and statement of said period, you were several times directed to produce

the whole record but to no avail.

Whereas you have misappropriated the Corporation revenue to the tune of Rs. 40,040/- and have deposited Rs. 25,000/- after deducting the

fraud by I/C depot Manager, TSD.

Whereas misappropriating the Corporation revenue, defrauding the Corporation and Govt. Furnishing the relevant the relevant record tantamount

to misconduct and warrants drastic action against you under rules.

Whereas in the first instance, you have been placed under suspension vide order No. JKSRCE-II/162 dated 21-04-08.

Now, therefore, before action as warrants under rules is initiated against you, you are asked to explain your position within a stipulated period of three days, failing which action as warranted under rules shall be taken against you.

10. A perusal of the aforesaid charge sheet would show that the writ petitioner-respondent was issued a book of vouchers bearing no. 46151 to 46200 and 46201 to 46250 which was for sale at A Class Tourist Service Division Counter at Tourist Reception Centre, Srinagar on 29.03.2003.

The charge sheet further states that the aforesaid vouchers were sold and the amount of sale proceeds was misappropriated. In response to the charge sheet, the writ petitioner-respondent has filed his response on 21.05.2008 which is in writing and reads thus:-

Pursuant to your charge sheet vide No. JKSRTC/TMCS/1078 dated 20.05.2008 served upon me, I submit my reply as under for favourable and sympathetic consideration.

In reply to paras 01, 02, 03 and 04, I submit that I was assigned the job of Counter Clerk in TRC Depot for sale of tickets, and it is an admitted

fact that the ticket books issued to me for the purpose were consumed in full and the amount received from time to time have been deposited in the

SRTC chest by me. As regards for furnishing the consumed records, I have to state that I am not able to locate the all consumed record and

furnish the same before your goodself, as the consumed record was being placed in an open area because of non-availability of Stock Almirah or

so for placement of consumed records; although the Incharge Counter (A/B Class) had made several requisitions for providing of Steel Almirah,

but always turned a deaf ear by my superiors, which tantamount the records were gutted by the dust, rain and snow (Photostat copy enclosed)

That I was ever depositing the amount earned from the tickets in SRTC Chest, but due to irregularity of disbursement of salary has resulted my

poor financial position and compelled to spend as part of amount for medical treatment of my spouse, who was ailing from severe disease and has

deposited soon an amount of Rs. 15,000/- and Rs. 10,000/- after receiving salary and shall deposit soon the rest of amount, besides, the charges

levelled against me be waved off in order to ascertain the financial condition of an employee, who is not being paid for six months and the

dependents are living hand to mouth rather starvation.

In view of above depicted facts request your goodself to take a humble action in my case, keeping in view my dedication of work and young age

and recommend my case for re-instatement to the authorities.

(Emphasis added)

11. A perusal of the aforesaid reply would show that the writ petitioner-respondent has spent the amount for medical treatment of his wife. He had

deposited a sum of Rs. 25,000/- and also promised to deposit the balance amount. He pleaded for waiving of the charges against him and also

request for a lenient view. In the whole reply, the writ petitioner-respondent did not contest the allegations nor pleaded any issue highlighting

contravention of any of the Regulations or provisions of law including incompetence of the officer issuing charge sheet. He did not even place on

record any document to show that his spouse was suffering from any disease. He deposited a sum of Rs. 25,000/- in two installments (15000 +

10000). It is in this background, that the findings recorded by the Enquiry Officer has to be viewed in respect of the charges of misappropriation

which reads as under:-

The suspendee was charge sheeted vide No. JKSR TC/TMCS/1087 dated 20.05.2008 to which he replied that he has not deliberately attempted

to misappropriate the Corporation revenue but due to some domestic circumstances and ailment of his wife he has not deposited a part of revenue

well in time, but soon has deposited Rs. 10,000/- and Rs. 15,000/- vide CR no. 12519 dated 15.04.2008 and 12559 dated 19.04.2008

respectively. The reply of the suspendee was not found convincing one however during the period of enquiry, the suspendee cooperated the

undersigned for handing the case. Since the suspendee has agreed and accepted the misappropriation of Corporation revenue. So it is, an

established case of misappropriation of Corporation revenue on the part of suspendee. Besides, it is an admitted fact that the late disbursement of

salary might have created an attempt of such mishap.

Keeping in view the above facts the case is returned back to General Manager (Admn) for his perusal and further orders please.

(Emphasis added)

12. The Enquiry Officer thus concluded that the writ petitioner-respondent had agreed and accepted misappropriation of the funds belonging to

appellant-Corporation which might be due to non-payment of his salary. On the basis of the aforesaid findings, the General Manager

(Administration) of the appellant-Corporation dispensed with the services of the writ petitioner-respondent.

13. It is well settled principle of law that if there is a candid admission made by a delinquent employee then no enquiry is required to be held.

The rationale for such a view is that u/s 58 of the Jammu and Kashmir Evidence Act, 1920 it has been laid down that a fact need not be proved in

any proceeding which is admitted before the Authorities or at the time of hearing by any writing under their hands. This principle came up for

consideration of Hon'ble the Supreme Court in the case of Sangramsinh P. Gaekwad and Others Vs. Shantadevi P. Gaekwad (Dead) thr. Lrs. and

Others, . In paragraph 213, the provisions of Section 58 of the Indian Evidence Act, 1872 have been quoted and in paragraph 214 the following

observations have been made:-

214. In terms of the aforementioned provision, things admitted need not be proved. In view of the admission of Respondent 1 alone, the issue as

regards allotment of 6475 shares should have been answered in favour of the appellants. The company petitioner at a much later stage could not

be permitted to take a stand which was contrary to or inconsistent with the original pleadings nor could she be permitted to resile from her

admissions contained therein.

(Emphasis added)

14. The aforesaid para has now been quoted with approval by Hon'ble the Supreme Court in the case of Goparaju Sri Prabhakara's case (supra).

In that case, a delinquent employee who was a habitual absentee was charge sheeted and he admitted the charges. In terms of Section 58 of the

Evidence Act, charges having been admitted, were not required to be proved and the enquiry proceedings were disclosed. The Supreme Court

did not accept any explanation. The plea raised before the writ Court which had not been pleaded in the department proceedings. The situation is

similar in the case in hand. Therefore, we are of the considered view that the order of termination or the enquiry proceedings do not suffer from any

legal infirmity warranting interference of this Court. Once the writ petitioner-respondent has candidly admitted the charges then it would pale into insignificance whether the authority was competent or not.

15. One aspect which may impel us to go into question concerning quantum of punishment is that the writ petitioner-respondent was not paid the salary for the period of six months. It is well settled that once the principles of natural justice have been followed and there is no procedural lapse on the part of the Authorities in holding of enquiry then the Courts would not be within their rights to question the quantum of punishment. In that regard, reliance may be placed on the judgment of Hon'ble the Supreme Court in the cases of *Indian Oil Corporation Ltd. and another Vs. Ashok Kumar Arora, and Ramesh Chandra Sharma Vs. Punjab National Bank and Another, .* However, in case where decision with regard to quantum of punishment has been arrived at by ignoring an important factor then the *Wednesbury* principle is attracted. The statement of the aforesaid principle has been succinctly made by a 7-judge Constitution Bench of Hon'ble the Supreme Court in the case of *Rameshwar Prasad and Others Vs. Union of India (UOI) and Another, ,* wherein summing up the *Wednesbury* principle, their Lordships of Hon'ble the Supreme Court have observed as under:-

The *Wednesbury* principle is misunderstood to mean that any administrative decision which is regarded by the Court to be unreasonable must be struck down. The correct understanding of the *Wednesbury* principle is that a decision will be said to be unreasonable in the *Wednesbury* sense i.e. (i) it is based on wholly irrelevant material or wholly irrelevant consideration, (ii) it has ignored a very relevant material which it should have taken into consideration, or (iii) it is so absurd that no sensible person could ever have reached it'.

16. Even otherwise, there could be mitigating factors which may warrant interference in the quantum of punishment awarded by the Authorities as has been pointed out by Hon'ble the Supreme Court in *Chandra Vilash Rai Vs. State of Bihar and Others, and Om Kumar and ors. v. Union of India* (2001) 2 SCC 386.

17. In the present case, the Enquiry Officer himself has recorded that there was non-payment of salary which has contributed to misappropriation.

However, in the dismissal order dated 31.01.2009, the aforesaid relevant factor has not been taken into account. Would then the order of

dismissal is liable to be set aside? We do not think that nonpayment of salary could have furnished the writ petitioner-respondent any excuse to

pocket the amount of the appellant-Corporation. He could have adopted many other courses. Therefore, we modify the order of dismissal to that

of compulsory retirement because it would not be possible to impose any employer on the Corporation who is found guilty of misappropriation of

appellant-Corporation fund as he has lost confidence of his employer.

18. Mr. Qayoom has made one submission mainly that when contempt petition No. 361/10 in SWP no. 551/2009 was pending then the order of

dismissal dated 31.01.2009 was withdrawn vide order dated 28.04.2012 and, therefore, its existence is clear from the record. However, we have

requisitioned the record of contempt proceedings and find that the contempt Court on 08.05.2012 has disposed of the contempt petition after

recording the statement of the counsel for the appellant-Corporation that the Corporation has complied with the direction issued by the learned

Single Judge without any prejudice to their cause in the instant Letters Patent Appeal. Therefore, we are of the view that withdrawal of contempt

petition particularly when the rights in the instant appeal have been reserved, would not affect the continuation of this appeal. Accordingly, we find

no substance in the objection which is rejected.

19. For the reasons aforementioned, the appeal is disposed of in the following manner:-

a) The disciplinary proceedings initiated by the appellant-Corporation are upheld.

b) The order dated 31.01.2009 terminating the services of the writ petitioner-respondent passed by the appellant-Corporation is modified to that

of compulsory retirement. The writ petitioner-respondent would be entitled to all the retirement benefits. However, he would not be entitled to any

salary for period of suspension or interregnum.

The appeal stands disposed of.