

(1998) 07 AHC CK 0092
In the Allahabad High Court
Case No : C.M.W.P. No. 20165 of 1991

Lal Chand Shukla

APPELLANT

Vs

U.P. Co-operative Institutional Service Board, Lucknow and
others

RESPONDENT

Date of Decision : 20-07-1998

Acts Referred:

Citation : (1998) 4 AWC 67 : (1998) AWC 68 : (1999) 1 UPLBEC 757

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Lallan Prasad Singh and L.K. Dwivedi, for the Appellant; S.C. and S.N. Singh, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—In a domestic inquiry, after Inflicting punishment of dismissal from service, the amount of loss as was found to have been suffered by the society, was sought to be recovered from the petitioner. This inflictment of punishment and decision for recovery of the loss from him has been challenged in this writ petition on various grounds.

2. Sri L. K. Dwivedi, learned counsel for the petitioner submits that the petitioner could not submit his reply or explanation on account of non-supply of certain documents, which he has been consistently asking for furnishing of the copies. The petitioner was not allowed inspection thereof. The respondents did not give him suspension allowance which reflects mala fide on their part and as such inquiry proceeding appears to be biased. He then contends that despite appearance of the petitioner the inquiry had proceeded ex-parte without affording any opportunity to him either to submit his explanation or to contest the inquiry. He further contends that in the impugned order they had referred to another report dated 6.12.1990, no copy whereof has been served on the petitioner, and therefore, the proceeding is hit by the principles laid down in the ratio decided in the case of Union of India and others Vs. Mohd. Ramzan Khan, .

The punishment could not have been inflicted without giving a show-cause notice to the petitioner. His further contention was that two punishments have been inflicted which is wholly beyond jurisdiction and not permissible under law and is otherwise forbidden by virtue of Regulation 84 of the Regulations. On this ground he contends that the order of punishment should be quashed and the petitioner should be reinstated with full salary.

3. Learned standing counsel on the other hand contends that the question that has been raised by the petitioner are all disputed questions of fact, as has been disputed in the counter-affidavit filed by the respondents. This Court sitting in writ jurisdiction cannot enter into disputed questions of fact, which can only be decided through evidence. Admittedly, according to him the petitioner did not submit any reply or explanation. He never contested the Inquiry nor he has participated in the inquiry. The petitioner had been asking for some documents which were in the custody of the petitioner who did not hand over charge inspite of several reminders Issued to him.

4. The documents which were relied upon, were asked to be inspected through several letters, but the petitioner did not turn up to inspect the said records. Since the petitioner having been sent notices, he did not attend the inquiry, therefore, the inquiry is to be carried on ex-parte. According to him non-furnishing of the report dated 6.12.1990, in the facts and circumstances of the case, does not vitiate the punishment or inquiry proceeding and the same does not attract the ratio decided in the case of Mohd. Ramzan Khan (supra). According to him there was no infirmity In the proceeding itself. It is open to the authority to inflict two punishments if the charges are so serious. Rule 84 cannot be Interpreted to such a limited meaning. Such interpretation would frustrate the purpose-of Rule 84 and would defeat the scheme of the rule. On these grounds he prays that the writ petition be dismissed.

5. I have heard learned counsel for the parties at length.

6. The petitioner was suspended on 19.9.1987. Admittedly, the petitioner is entitled to subsistence allowance from the date of his suspension. Admittedly suspension allowance has not been paid to him. It is alleged by the respondents that the petitioner refused to receive suspension allowance. He also did not present himself to Gorakhpur office where he was attached, from where suspension allowance was to be paid. The petitioner denies and disputes such a situation. Whether the petitioner had refused to receive suspension allowance or whether the petitioner did not attend Gorakhpur office to receive the suspension allowance, are facts which have been disputed by the petitioner and the respondents between themselves. Thus, the fact having been disputed gives rise to disputed question of fact. Such fact admittedly can be decided only through evidence. This Court sitting in writ jurisdiction cannot enter Into such disputed question of fact. Therefore, this Court refrains from deciding such a question and if such question remains undecided then the issue of mala fide also cannot be gone into.

7. In terms of Regulation 85 (vii), an employee is entitled to subsistence allowance according to relevant rules applicable to State Government employees. But such entitlement is subject to the second proviso to clause (vii) of Regulation 85 viz., that "no payment of the subsistence allowance shall be made unless the employee has furnished a certificate," satisfying the authority that he was not engaged in any other employment, business, profession or vocation and had not earned remuneration therefore during the period under suspension.

8. Thus, it appears that in order to get the suspension allowance the employee has to furnish certificate to satisfy the authority that he was not engaged in any other employment, business, profession or vocation and had not earned remuneration therefore during the period under suspension. In the present case there is nothing to indicate that the petitioner had furnished such certificate. In view of such provision the employee would be entitled to receive suspension allowance only when he furnishes such certificate.

9. According to clause (vii) (a) of Regulation 85 subsistence allowance is the entitlement of the delinquent. This entitlement cannot be withheld except in accordance with the provisions contained in the said clause namely on failure to furnish such certificate as contemplated in the second proviso. In order to enable the petitioner to receive the suspension allowance he has to furnish a certificate according to the second proviso.

10. In such circumstances if the petitioner furnishes such certificate for the period during which he was under suspension in that event it would be incumbent on the part of respondents to pay suspension allowance.

11. The question that the petitioner could not submit his reply in absence of furnishing the documents, cannot be sustained. The petitioner could have submitted his reply or explanation even without such documents reserving his right to submit further explanation after copy of those documents were furnished to him by the respondents. At the same time it is alleged by the respondents that the petitioner was demanding those documents which were in the custody of the petitioner and he did not hand over those documents. Admittedly, the petitioner has not asserted anywhere that he had handed over charge. The fact remains that the petitioner has not disputed the facts as alleged by the respondents that he has not handed over charge. If there is such a situation in that event there may be a presumption that the petitioner might have been asking for those documents which he has not handed over along with the charge and which might be in his custody. But the petitioner denies these contentions. Thus, it becomes again a disputed question of fact which cannot be decided sitting in writ jurisdiction. Whether those documents were in the custody of the petitioner or in the custody of respondents, being a disputed question of fact and having been undecided it is not possible for this Court to come to a definite finding. At the same time it is alleged by the learned counsel for the respondents that the petitioner was asked through several notices to inspect documents, but he has not done so. From the annexures filed along with the writ petition, it

appears that the petitioner went on stating the same thing that he should be supplied necessary documents for which he was asking for and went on making the demand of those documents in order to enable him to submit his reply even after the impugned order was passed; Thus, the petitioner having not availed himself of the opportunity, he cannot turn round and say that no opportunity was afforded to him. Thus, this ground taken by Sri Dwivedi cannot be sustained.

12. Admittedly, the petitioner did not submit his reply or explanation. He has also not denied that he has been given notice for appearance in the inquiry. On the other hand in his successive letters he has admitted that he was asked to appear in the inquiry, but he would not appear unless he is supplied the copies of the document and so he did not participate in the inquiry. Therefore, the inquiry had proceeded ex-parte. The fact that several notices were issued to the petitioner has not been disputed, therefore, the inquiry having been proceeded ex-parte it is not open to the petitioner to contend that the inquiry has proceeded ex-parte without giving any opportunity of hearing to the petitioner. Inasmuch as the petitioner was afforded sufficient opportunity to submit his reply and to appear in the inquiry, that spread over a period between September 1987 till May 1989. Therefore, he cannot complain that he was not given opportunity. This point of the petitioner also cannot be sustained.

13. Admittedly, the petitioner was furnished copy of the report and he was asked to show cause against the proposed punishment. The petitioner did submit reply to the show-cause notice against the proposed punishment. The notices issued in respect of punishment satisfy the conditions that emanates from the ratio decided in the case of Mohd. Ramzan Khan (supra) but the petitioner did not avail the opportunity of hearing on his reply. He, therefore, cannot complain about the non-compliance of the conditions as laid down in the ratio in the case of Mohd. Ramzan Khan (supra).

14. So far as the report dated 6.12.1990 is concerned it appears from the impugned order dated 24.4.1991, which is Annexure-29 to the petition that the same was the report which was prepared after second show-cause notice was given to him. Learned counsel for the petitioner contends that there was one inquiry report dated 18.5.1989, copy whereof was furnished to the petitioner but the other report dated 6.12.1990 was not furnished to him. A plain reading of the order as contained in Annexure-29 to the petition indicates that the second show-cause notice was issued by giving him 15 days time to show-cause against the proposed punishment, but the petitioner did not submit any reply to the show cause notice. Thereupon by letter dated 31.8.1989 he was again given opportunity. He submitted his reply which was duly considered and then the petitioner was afforded opportunity of hearing on 15.1.1990 by a notice and thereafter again on 20.3.1990 and again on 17.11.1990, but the petitioner did not appear on any of the said date. In such a circumstance on 23.11.1990 the disciplinary authority had requested the Inquiry Officer to give his comments on the said inquiry report having regard to the reply submitted by the petitioner.

Thereupon the inquiry Officer had given his comments on 6.12.1990 on the basis of reply (to the second show-cause notice), as given by the petitioner, having regard to the inquiry report. Thus, it appears that the letter dated 6.12.1990 was not the Inquiry report but it was the comment on the second show-cause notice on the basis of reply submitted by the petitioner. Therefore, it is only an internal process for consideration adopted by the disciplinary authority with which the petitioner is not concerned. Despite having been given several dates extending for almost eleven months, he did not avail of the opportunity to appear in the hearing to support his reply to second show-cause notice. On the other hand the respondents have shown considerable application of mind on the basis of materials available on record, as it appears from the order dated 24.4.1991. The ratio decided in Mohd. Ramzan Khan (supra) requires service of second show-cause notice proposing punishment upon furnishing of the enquiry report. It does not require service of any further notice nor it require furnishing of any comments on the reply to second show-cause notice prepared internally for consideration of the reply to the second show cause having regard to the enquiry report. Thus, the said report dated 16.12.1990 cannot attract the mischief as laid down in the case of Mohd. Ramzan Khan (supra) as has been sought to be contended by Sri Dwivedi. Therefore, this point also cannot be sustained.

15. Now the other question that there cannot be two punishments in view of Regulation 84 of the U. P. Co-operative Employees' Service Regulation, 1975 (hereinafter referred to as Regulations), which prescribes that only one punishment specified in Rule 84 (t) can only be inflicted, is a question which requires determination. Regulation 84 (i) prescribes that if an employee commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence u/s 103 of the Act or does anything prohibited by these regulations, he shall be liable to be punished by any one of the penalties provided thereunder. In order to appreciate the situation it is necessary to refer to the exact expression used in Regulation 84 which may be quoted for our benefit, as under :

"84. Penalties.--(i) Without prejudice to the provisions contained in , any other regulation, an employee who commits a breach of duty enjoined upon him or has been convicted for criminal offence or an offence u/s 103 of the Act or does anything prohibited by these regulations shall be liable to be punished by any one of the following penalties :

(a) Censure

(b) Withholding of increment,

(c) Fine on an employee of category IV (peon, chaukidar etc.)

(d) Recovery from pay or security deposit to compensate in whole or in part for any pecuniary loss caused to the Co-operative Society by the employee's conduct.

(e) Reduction in rank or grade held substantively by the employee,

(f) Removal from service, or

(g) Dismissal from service."

16. This section prescribes that the delinquent would be liable for any one of the punishments mentioned above, for a breach of duty or for his conviction for criminal offence for such breach of duty or an offence u/s 103. The expression used in the section may conceive of a scope or a possibility of an interpretation to the extent that the expression "any one" qualifies all the penalties by the breach which is signified as "a breach", meaning thereby single offence or conviction, meaning one conviction. It may be said that the expression "any one of the penalties" is co-related to one breach, one offence and one conviction. It may also be contended that where there are more than one breach more than one offence, more than one conviction then any one of the penalties may be imposed for each number of such breach, offence or conviction. Thus, it may be Interpreted to mean that "the expression any one does not confine to a situation that whatever might be the number of breach or number of offence committed, the person would be liable only for single punishment.

17. In the present case, it is alleged that the petitioner has been found to have caused loss of a sum of Rs. 5.85.436.12 paise. There were several charges for several offences alleged against the petitioner. It may be contended that if it is held that this amount which has been found to have been lost, cannot be recovered, in that event the person will be left free only with dismissal of his service without paying the amount, which he has embezzled. Such an interpretation would not conform to the scheme of the Regulation. The Regulation requires to be interpreted in a manner which will encourage "discipline" and not "indiscipline." It appears that if such an interpretation is accepted as contended by Sri Dwivedi, in that event it will encourage indiscipline and the persons will prefer to get dismissal from service if he is permitted to retain the embezzled amount. The amount so embezzled is the money of the public and no one can get benefit by retaining the said amount.

18. The above interpretation though seems to be plausible and attractive, but in fact it appears to be a little strained an interpretation stretching too far. The expression used in Regulation 84 (i) does not appear to fully conform to such an interpretation.

19. This question was raised in the case of Vijay Bahadur Yadav v. Chairman. U. P. Co-operative Federation Ltd. . But in the said case the question was not finally decided as it would appear from the observation made in paragraphs 5, 6 and 7 of the said decision which runs as " follows :

"5. The impugned order providing for the three penalties cannot be "sustained, but since against the said order appeal is pending before the appellate authority, I am not inclined to pass any order on the merits of the punishment.

6. Learned counsel for the petitioner submitted that the appeal is still pending

and has not been decided during the pendency of the appeal the respondent Federation has proceeded for recovery of the amount and also for the stoppage of the annual increment and in this connection has passed the order dated 21.4.1992.

7. When the appeal is pending, then it is not proper to give effect to the order appealed against. In this view of the matter, the order dated 21.4.1992 cannot be sustained. The order dated 21.4.1992 is hereby restrained from giving effect to the order of punishment until the appeal of the petitioner is decided."

20. There it appears that the question was left undecided. Then again the said case there was no order of dismissal as such recovery could be made from the salary. But in the present case there being an order of dismissal there is no scope for recovery of any amount from the salary.

21. That apart in the facts and circumstances of the present case, it would not be necessary to interpret the said provision. Though the point was raised, but the order of recovery, as discussed below, not being a punishment within the meaning of clause (d) of Rule 84 (i), this Court is not called upon to decide the said question.

22. The punishment provided in clause (d) is "recovery from pay or security deposit.....". Therefore, in order to be a punishment within the meaning of clause (d) of Regulation 84 (i) it has to conform to the exact punishment stipulated in the Regulation.

23. The punishment that has been stipulated in clause (d) of Rule 84 (i) as indicated above, recovery is to be made from the pay or security deposit. If only one such punishment is to be inflicted, in that event the order of dismissal cannot be inflicted, presuming it is contemplated that only one punishment can be inflicted under Rule 84 (i). Thus, in that event the recovery is intended to be made only when the person is in service since such recovery is to be made from the pay or security deposit. The expression "pay" or "security deposit" means that it may be recovered either from the pay or from security deposit where there is security deposit. If there is no security deposit and if security deposit is inadequate, then it can be recovered from the pay also. Thus, recovery can be effected either from pay or from security deposit or from both. Thus, such punishment can be inflicted only when the delinquent remains entitled to his pay. Such punishment cannot be inflicted where the order of dismissal or removal has been passed. Since in such case there could be no scope for recovering the amount either from the pay or from security deposit. Admittedly, expression "pay" does not include superannuation benefit. The benefits received on retirement are not pay. They are either pension, gratuity or such other different kinds of payments which are distinct and different from pay. Expression "pay" means emoluments in lieu of service rendered during the continuation of service. Retirement benefits are neither pay nor emoluments.

24. A plain look at the order of punishment dated 24.4.1991 (Annexure-29)

indicates that the amount was directed to be recovered by initiating appropriate proceeding against the petitioner after adjusting such amount which might be payable to him under law. Thus, the said order is not an order of punishment, but is a direction for recovery of the amount through appropriate proceedings. A proceeding for such recovery is always open to be defended by the delinquent when such proceeding is initiated against him. Inflicting of punishment of dismissal does not preclude the employer from recovering the loss caused by the delinquent through appropriate proceedings. There cannot be any embargo in initiation of proceeding for recovery of such amount which otherwise the delinquent is not entitled to retain. The order of punishment does not create a right on the delinquent to retain such amount. But however whether such amount is recoverable or not is a question to be decided in the proceedings itself through which such recovery is sought to be made within the limits of the proceedings as are permissible in law.

25. Here in this case it seems that the amount of loss has been sought to be recovered not by way of punishment but since he was found to have benefited out of the said amount, the same was sought to be recovered. Such recovery may not be considered to be a punishment. Even without Inflicting punishment it is open to the society to recover the amount from its employee if such an employee benefits himself by retaining such an amount, this would be simple recovery without being a punishment since in this case the petitioner had been found to have received the said amount which belonged to the society and this is being sought to be recovered. On this analogy there may be different look at the said provision which negatives the contention of Sri Dwivedi, that if one punishment is inflicted then the amount can never be recovered from the delinquent.

26. For all these reasons, I am not inclined to interfere with the impugned order. The writ petition, therefore, falls and is accordingly dismissed in part. So far as the question of payment of suspension allowance is concerned, the respondents are directed to pay the suspension allowance to the petitioner within a period of six months from the date a copy of this order is furnished to the said respondent, for the period between the date of suspension namely 19.9.1987 till 24.4.1991 provided the petitioner produces such certificate to satisfy the respondents in terms of the second proviso to clause (vii) of Regulation 85 of the said Regulation. However, it will be open to the petitioner, if proceeding for recovery is initiated, to contest the same in accordance with law, if he has any right to defend under the law.